

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
MARIA RUTH BURLEY
Applicant

Alfred S. Blumberg
For the Application

Jody Kline, Esquire
Attorney for the Applicant

Martin Klauber, Esquire
People's Counsel
Taking No Position on the Application

Richard Brush
Department of Permitting Services

Steve Dye
Lynn Mayo
Francis Cameron
Opposed to the Application

Before: Martin L. Grossman, Hearing Examiner

Zoning Application No. G-809

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

Applicant:	Maria Ruth Burley (Developer is Centex Homes Corp.)
LMA No. & Date of Filing:	G-809, filed September 17, 2004
Zoning and Use Sought:	Zone: R-T 8 Use: 31 Single Family Townhouses
Current Zone and Use:	Zone: R-90 Current Use: Single Family Home & Woods
Location:	East side of Seven Locks Road, approximately 1,600 feet north of its intersection with Democracy Boulevard
Applicable Master Plan:	<i>2002 Potomac Subregion Master Plan</i>
Acreage to be Rezoned:	Approximately 5.23621 acres (228,090 sq. ft.)
Right-of-Way to be dedicated:	Technical Staff will consider, at subdivision review, requiring dedication of 40 feet from the centerline of Seven Locks Road
Density Permitted in R-T 8 Zone:	8 units per acre = 41 Dwelling Units on 5.23621 acres
Density Planned:	5.9 units per acre (<i>i.e.</i> , 31 Dwelling Units on 5.23621 acres)
Bldg. Coverage Allowed/Planned:	35% Maximum (79,832sq.ft.) / 20% planned (45,600 sq.ft.)
Green Space Required/Planned:	50% Required (114,045 sq.ft.) / 65% planned (148,300 sq.ft.)
Parking Spaces Required/Planned:	62 required (2 spaces per unit) / 76 planned (2.45 per unit)
Building Height Limits:	35 feet maximum allowed / 35 feet planned
Traffic Issues:	Opposition from neighbors and concern by People's Counsel based on traffic backups on Seven Locks Road
Storm Water Drainage:	Storm water Quality Control will be provided on site, but Quantity Control has been totally waived by DPS; there is concern about water runoff
Environmental Issues:	Technical Staff conditionally supports this project, but there are concerns about stormwater management and loss of trees.
Consistency with Master Plan:	The Master Plan does not specifically recommend rezoning from the current R-90 Zone, but the R-T 8 Zone would also be consistent with the residential land use recommended by the Plan
Neighborhood Response:	Opposition based on traffic, school over-crowding, construction impact, danger from steep slope of new access road, tree loss caused by density of development and stormwater management issues.
Planning Board Recommends:	Approval, but noting that the number, size and layout of the units may have to be revised at subdivision and site plan to protect the environment
Technical Staff Recommends:	Approval, with same reservation as Planning Board
Hearing Examiner Recommends:	Remand with Instructions

II. STATEMENT OF THE CASE

Application No. G-809, filed on May 9, 2003, by Applicant Maria Ruth Burley, requests reclassification from the existing R-90 Zone (Residential- single family homes) to the R-T 8 Zone (Residential Townhouse, with maximum of 8 units per acre) of 5.23621 acres of land. At Applicant's request in August of 2003 (Exhibit 34), the case was removed from the calendar to allow Applicant more time to work with Technical Staff of the Maryland-National Capital Park and Planning Commission ("M-NCPPC"). There was also a flurry of opposition letters (Exhibits 21 through 33) filed around that time. After some additional delays at Applicant's request, the matter was finally calendared for a hearing on April 8, 2005.

The subject site (Tax Account Nos. 10-00849463 and 10-00849452) is comprised of Parcels 361 and 417, and it is located at 10401 and 10525 Seven Locks Road in Potomac. It is on the east side of that arterial road, approximately 1,600 feet north of its intersection with Democracy Boulevard. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits the filing of a Schematic Development Plan (SDP), containing binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development with "[n]ot more than 31 (thirty-one) one-family attached dwelling units."¹

The application was reviewed by Technical Staff who, in a report dated March 23, 2005 (Exhibit 46), recommended approval, subject to revision of the number, size and layout of the units at subdivision and site plan to protect the environment.² The Montgomery County Planning Board ("Planning Board") considered the application on March 31, 2005 and unanimously recommended approval, subject to the same reservation mentioned by Technical Staff, as stated in the Board's

¹ Applicant's original plan called for 34 units, but based on Technical Staff's concerns, that number was reduced, first to 30 units, then to 27 units. The number ultimately went back up to a maximum of 31 units, after the Council approved Bill No. 24-04/25-04/27-03, effective April 1, 2005, which, *inter alia*, amended Montgomery County Code §25A-5(a) to expand the applicability of the MPDU requirements to all residential developments of 20 or more units submitted for approval of a preliminary plan of subdivision. The amended law would require the development to have 12.5% (*i.e.*, four) Moderately Price Dwelling Units (MPDU's).

² The Technical Staff Report is quoted and paraphrased frequently herein.

Memorandum of April 4, 2005 (Exhibit 49). Opposition letters from both 2003 and 2005 are attached to the Technical Staff report (Exhibit 46). One of those opposition letters is from the Inverness North Homeowners Association, although no witness from that Association appeared at the hearing. An additional 22 opposition letters received by the Planning Board after the March 23, 2005 Technical Staff report are in the record as Exhibit 47. One of the letters received after March 23 is from “Friends of Cabin John Creek Watershed,” a volunteer organization “dedicated to the restoration, preservation and stewardship of the Cabin John Creek Watershed.” Most of the letters contain the same text, and the concerns raised will be discussed in Part III of this report.

A public hearing was convened on April 8, 2005, at which time the Applicant presented the testimony of an expert in land use planning to support of the application. Opposition testimony was presented by three nearby residents, Steve Dye, Lynn Mayo and Francis Cameron. Ms. Mayo testified as an expert in water resources management. Martin Klauber, the People’s Counsel, participated in the hearing, and called himself as a witness to rush hour traffic conditions on Seven Locks Road. He maintains a neutral position on the application. Testimony regarding storm water management was also provided by Richard R. Brush, Manager of the Water Resources Plan Review Section of the Department of Permitting Services (DPS), which had approved a Stormwater Management Concept Plan (SWMCP) for the subject site. Mr. Brush appeared at the request of both the Applicant and the Opposition.

The hearing was completed on April 8, 2005, and the record was held open until May 9, 2005 to allow Applicant time to file a revised SWMCP and additional materials. Applicant filed the revised materials, and the new SWMCP (Exhibit 77(a-e)) was reviewed and approved by DPS on April 26, 2005 (Exhibit 79(a)).

On May 9, 2005, Applicant’s counsel filed a revised SDP (Exhibit 81(a)) and requested that the record remain open so that an executed copy of the Declaration of Covenants could be filed (Exhibit 81). On the same day, the Hearing Examiner issued an order holding the record open for another 10

days, until May 19, 2005. On May 16, 2005, the Hearing Examiner sent a letter to Applicant, with copies to all participants in the hearing, asking that Applicant make some changes to the SDP that had been promised at the hearing and add a notation to the SDP agreeing to changes in the proposed development at subdivision and site plan review, including revision of the number, size and layout of the units to protect the environment and possibly the addition of traffic mitigation measures. By letter of May 23, 2005, the Hearing Examiner asked Applicant to include a statement in its binding elements that it was willing to provide any road dedication and traffic mitigation measures required by the Planning Board at subdivision and/or site plan review.

On May 27, 2005, Applicant filed a final revised SDP (Exhibit 89(a)). Applicant elected not to include a promise in the binding elements to provide any road dedication and traffic mitigation measures required by the Planning Board. Instead, Applicant stated in the “General Notes” of the SDP that it would dedicate area as necessary and that it “acknowledges that conditions of approval at subdivision and site plan” may include measures to improve traffic capacity and flow. At the request of Applicant, the record was held open until June 1, 2005, to allow Applicant more time to file the executed Declaration of Covenants. They were eventually filed on June 1, 2005 (Exhibit 92), and the record closed on that date.

This was a close case because the proposed townhouses are quite compatible with surrounding development in terms of the type of housing units proposed; however, the combination of environmental and traffic congestion concerns leads the Hearing Examiner to recommend remand to require a sufficient reduction in the number of planned dwelling units such that the Department of Permitting Services can approve a Stormwater Management Concept Plan without waiving channel protection requirements, and to require Applicant to commit in Binding Elements to any necessary traffic mitigation measures. A remand would also give Applicant an opportunity to present evidence on traffic issues raised at the hearing.

III. FINDINGS OF FACT

A. Subject Property

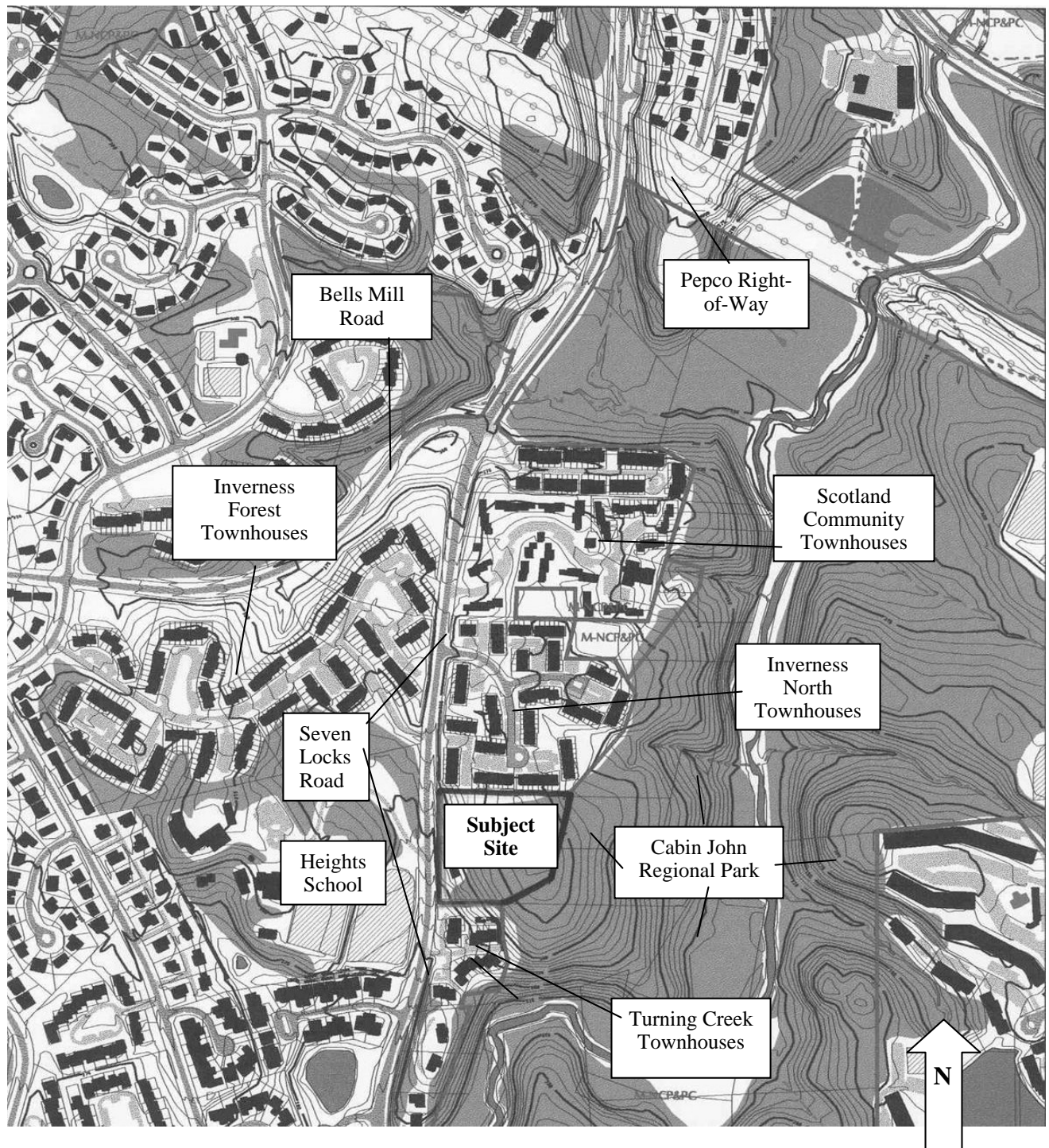
The subject site is located on the east side of Seven locks Road approximately 1,600 feet north of its intersection with Democracy Boulevard. Two parcels comprise the subject property, Parcel 361 and Parcel 417, with a total of approximately 5.23621 acres. Technical Staff describes the site as almost rectangular in shape, with approximately 458 feet of frontage on Seven Locks Road and a maximum depth of approximately 569 feet. Presently, the site is developed with a single detached dwelling unit in the southwest corner of the site. There is a winding driveway from Seven Locks Road to the dwelling unit and a chain link fence along the entire length of the northern property line. A photo of the lone house and its winding driveway, taken from Seven Locks Road, is shown below (from Exhibit 48):



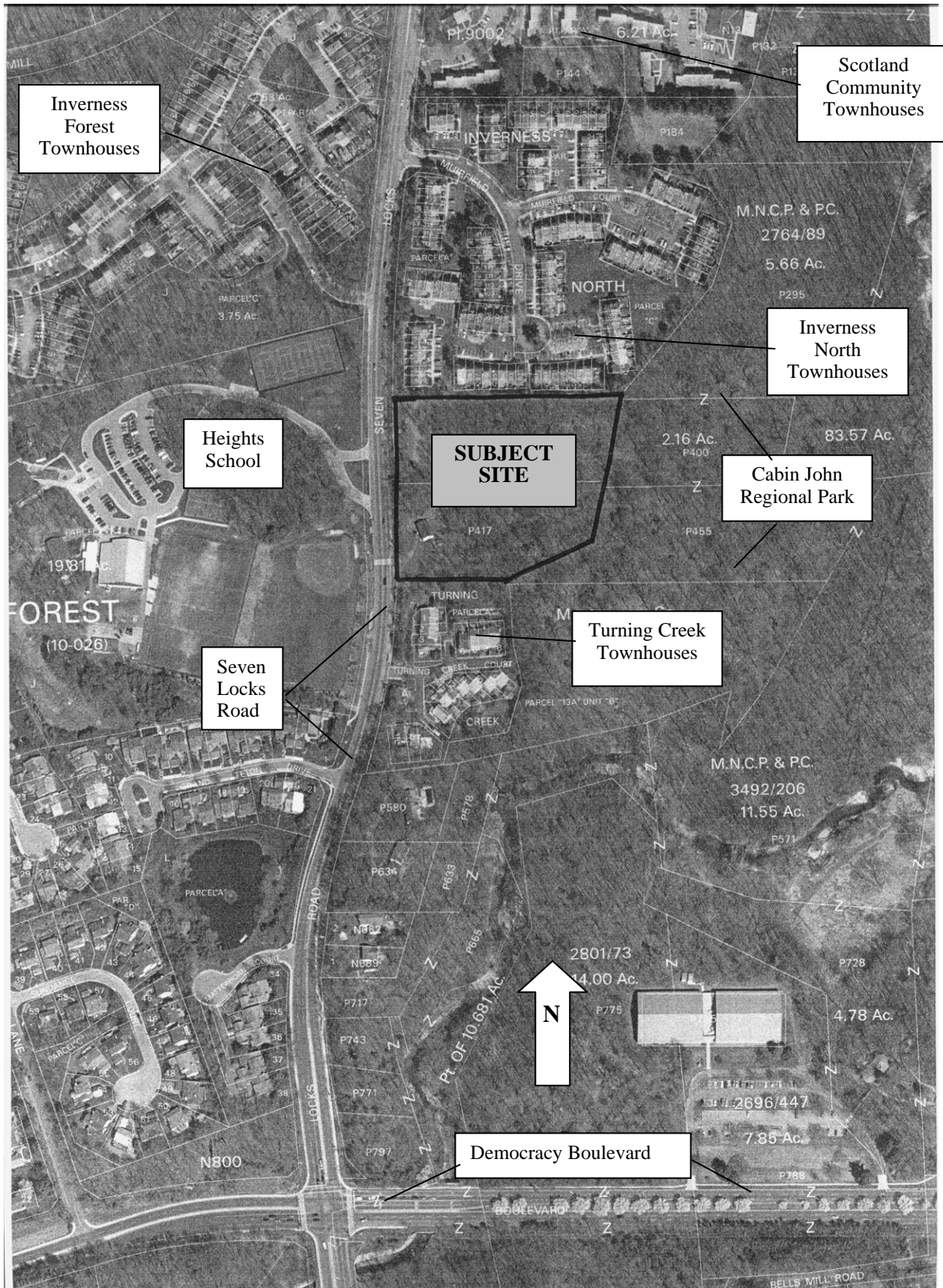
Technical Staff notes that the subject property is approximately 77 percent forested, with significant, large specimen trees and very steep slopes. The property rises from a low point in the southwest corner with an overall grade of 16.5 percent. The steepest slopes are to the west, reaching a 21.2 percent grade and from the southwest corner, reaching a 24 percent grade, which, according to Technical Staff, renders this part of the site undevelopable. A sense of this heavily forested area can be obtained from the following aerial photo of the subject site (Exhibit 48):



The townhouse developments to the north and south of the subject site can be seen in the following Vicinity Map from the Technical Staff report (Exhibit 46).

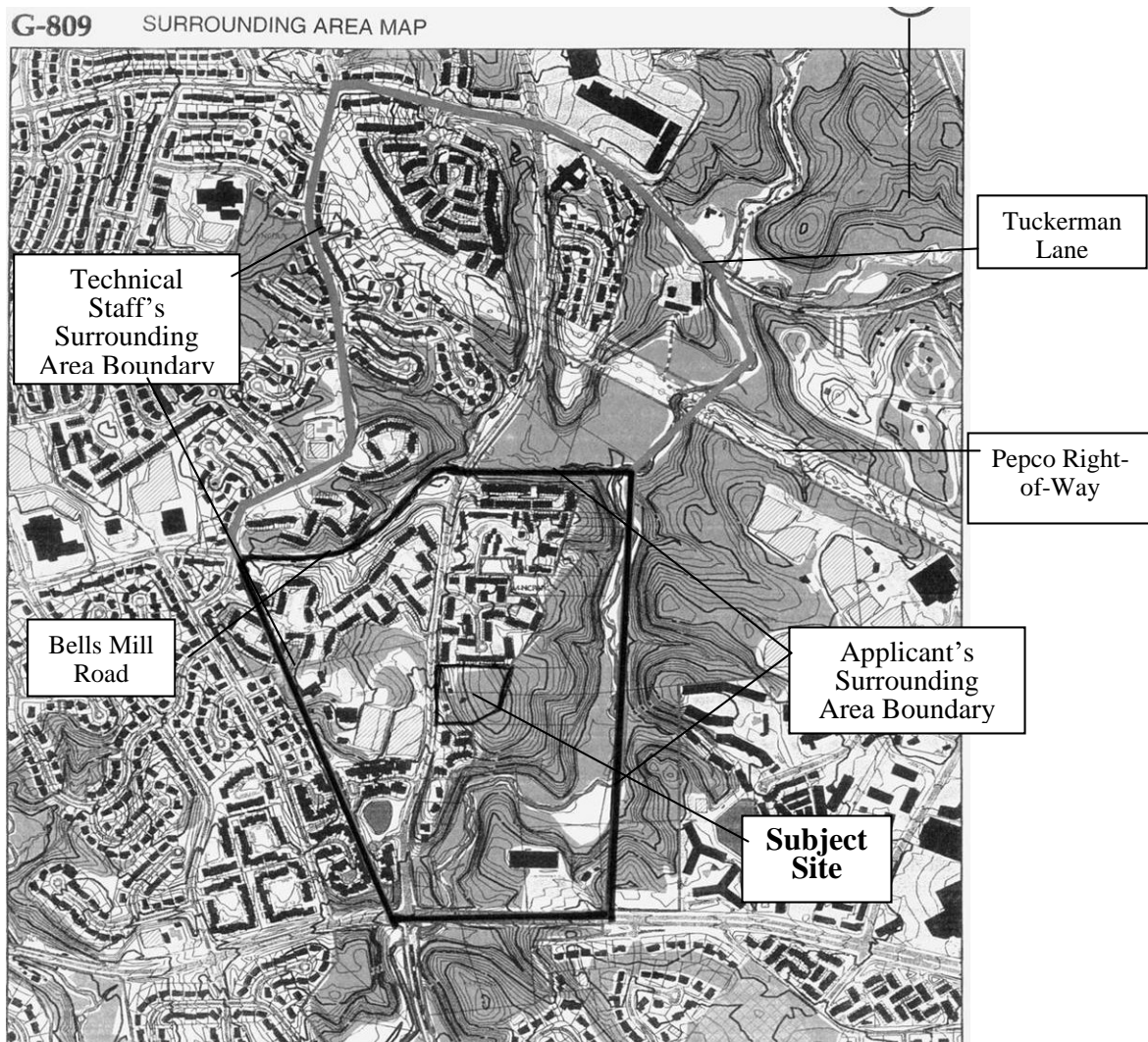


An even better sense of the area can be obtained from viewing a portion of the aerial photo, introduced as Exhibit 53:



B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. Technical Staff recommends describing the “surrounding area” as bounded by Tuckerman Lane to the north, Cabin John Regional Park to the east and Democracy Boulevard to the south, and including the confronting properties across Seven Locks Road to the west of the subject site. Applicant’s Land Use Expert, Alfred Blumberg, agreed with Technical Staff’s proposed “surrounding area” except to the north, Mr. Blumberg opining that Technical Staff extended it too far to the north, and should have ended it at Bells Mill Road. Tr. 99-102. Both proposed definitions are shown below in a Map from Exhibit 46:



In support of his opinion, Mr. Blumberg observed that “[t]here's nothing north of Bells Mill Road that in any way would be impacted by or affected by or visually even see the subject property.” Tr. 102. He also testified that the Council had accepted a “surrounding area” description bounded by Bells Mill Road on the north when it considered LMA G-326, the rezoning of Turning Creek Townhouses, the property immediately to the south of the subject site. Tr. 101. Since there is no evidence in this case that the proposed development would have any impact on the area north of Bells Mill Road, the Hearing Examiner agrees with Applicant’s expert and accepts his description of the surrounding area, which is the same as Technical Staff’s except that the northern boundary is Bells Mill Road, not Tuckerman Lane.

The Technical Staff report describes the uses in the “surrounding area.”

The property immediately north of, and abutting the site, is zoned R-T 12.5 and is developed with the Inverness North townhouse complex. The Scotland Community abuts the Inverness North townhouses to the north, is zoned R-T 12.5, and consists of 100 townhouses, of which 25 are owner-occupied and 75 are rental units. . . .

To the east and along the subject site’s rear property line is the Cabin John Regional Park, zoned R-90, and owned by the Maryland-National Capital Park and Planning Commission (M-NCPPC). Two contiguous forested parcels, P400 and P455, abutting the subject site and within the Park were acquired by the M-NCPPC from the Burley estate in 1964 by mutual agreement.

To the south of the subject site, the property is zoned R-T6.0 and developed with the Turning Creek townhouse complex. The remaining properties south of and along Seven Locks Road are zoned R-90 and are either undeveloped or developed with single-family detached dwelling units.

Directly across Seven Locks Road and west of the site, the property is zoned R-90 and developed with a private educational institution, the Heights School. A special exception was granted to operate this educational institution in 1967. South and west of the Heights School the properties are zoned R-90 and developed with single-family detached dwelling units. North of the Heights School, the property is zoned R-90 and developed with the Inverness Forest subdivision, consisting of single family and townhouse units. . . .

C. Zoning History

Technical Staff recites the Zoning History of the site as follows:

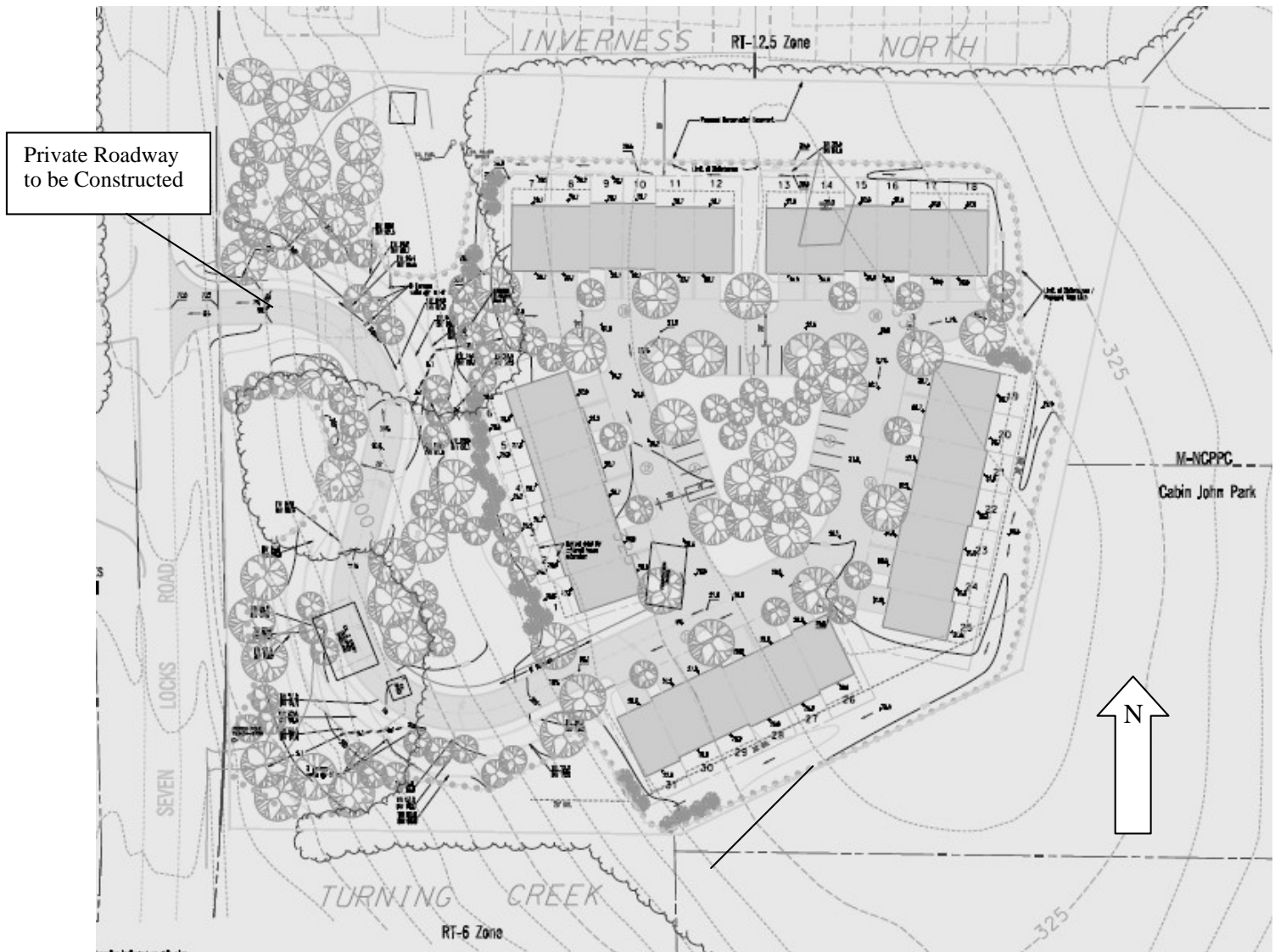
1. Comprehensive Zoning
 - a. 1954 Countywide comprehensive zoning: R-A Zone enacted.
 - b. 1958 Countywide comprehensive zoning: R-90 Zone enacted.
 - c. SMA- G-247: R-90 Zone reconfirmed - approved September 30, 1980.
 - d. SMA-800: R-90 Zone reconfirmed - approved October 10, 2002.
2. Local Map Amendments
 - a. Local Map Amendment (F-419): reclassification [of the subject site] from the R-90 Zone to the R-T Zone approved on December 30, 1969. At that time, the R-T Zone permitted densities up to 12.5 dwelling units per acre.
 - b. Local Map Amendment (F-903): reclassified [the subject site from] the R-T Zone back to the R-90 Zone at the applicant's request due to increased financial tax burden, approved on July 9, 1973.

The interesting thing to note in this zoning history is that the Council had previously approved this site for development under the R-T Zone, at even greater density than that which is sought here. This action took place in 1969, when the Council considered and approved zoning application F-419 and rezoned the subject property from the R-90 zone to the R-T zone.³ When the planned project failed to go forward, the Burley family was left with a property which it could no longer afford to own because of the increased tax assessment associated with the more intense zoning. In an effort to relieve the tax burden on the property owner, the County Council, in 1973, rezoned the property back to the previous R-90 zoning classification. Exhibit 52.

D. Proposed Development

The Applicant seeks to have the subject site reclassified from its current R-90 Zone to the R-T 8 Zone so that she can construct a maximum of thirty-one residential townhouse units on the 5.23621 acre subject site. An overview of the project can be seen in the illustrative diagram below, taken from a rendered version of the SDP (Exhibit 54):

³ Of course, many things have changed since 1969, including the state of development in the area and the applicable stormwater management and forest conservation regulations. The current situation is the subject of this analysis.



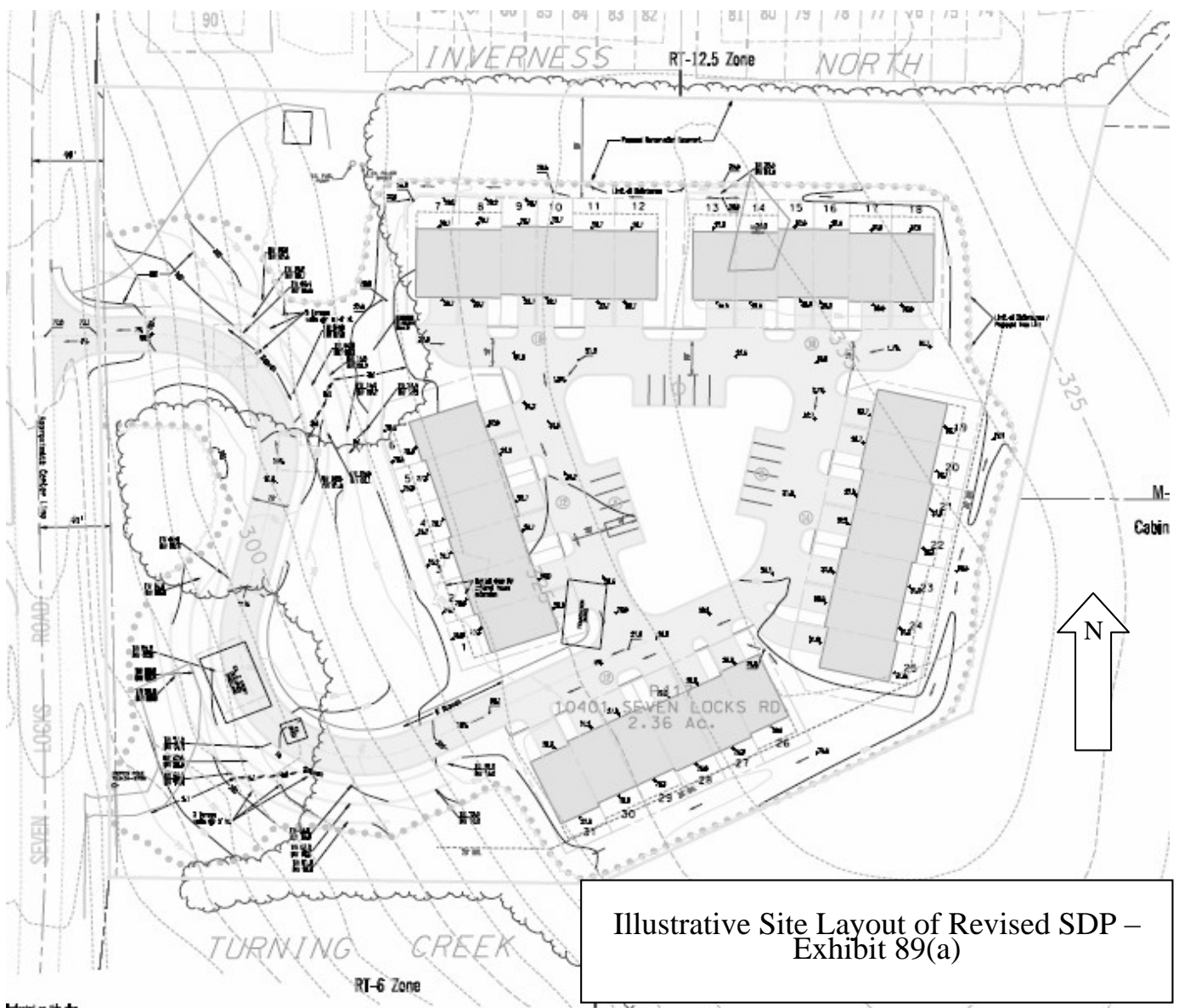
As can be seen, the plan is for all the units to surround a landscaped courtyard. Twenty-seven of the 31 townhouse units would have a two-car garages, and four of the units would have single car garages. It is intended that the four units with single garages be Moderately Priced Dwelling Units (MPDUs). An additional 18 parking spaces are located outdoors, surrounding the center of the development, bringing the total to 76 parking spaces.

Access to the site would be from Seven Locks Road via a winding private roadway. No phasing schedule for construction of the development is proposed, and there are no historic resources on the property. If rezoning is approved, then the proposal will have to go through review and

approval of a Preliminary Plan of Subdivision, a Site Plan, a Final Forest Conservation Plan and a Final Plat of Subdivision by the Planning Board.

E. Schematic Development Plan and Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. The site layout on the revised SDP (Exhibit 89(a)) is illustrative, and it is shown below:



In addition to the illustrative graphic on the SDP, there is a section of the SDP which describes the development's "Binding Elements:"

BINDING ELEMENTS

DEVELOPMENT STANDARD	PERMITTED / REQUIRED	BINDING ELEMENT
1. Land Use	As per Sec. 59-C-1.7	Exclusively one-family attached dwelling units
2. Density	41 one-family attached dwelling units	Not more than 31 (thirty-one) one-family attached dwelling units
3. Building Coverage	35% or 79,832 sq.ft.	Not more than 20% or 45,600 sq.ft.
4. Green Space	50% or 114,045 sq.ft.	Not less than 65% or 148,300 sq.ft.

Those elements designated by the Applicant as binding must also be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the executed Declaration of Covenants in the administrative record of this case as Exhibit 92.

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment. In the subject case, the Planning Board's transmittal memorandum of April 4, 2005 (Exhibit 49) made quite clear that, "in the event of the application obtaining the approval of the District Council, the layout must be revised during the preliminary plan and site plan process to meet environmental requirements." The Binding Elements in this case would give the Planning Board the some flexibility to make revisions because, other than

the requirement that the dwelling units be “one-family attached dwelling units,” those Binding Elements are expressed in maximums and minimums, rather than absolute values.

In addition to the Binding Elements, the revised SDP contains Site Data, Development Standards for the Zone and General Notes, all of which are set forth below.

SITE DATA

SCALE: 1"=2000'

1. Gross Tract Area	5.23621 Acres (228,090 sq.ft.)
2. Planning Area	Potomac Subregion
3. Existing Zoning	R-90
4. Proposed Zoning	RT-8
5. Number of Units Proposed	31
6. Density Proposed	5.92 DU / Acre
7. Off-Street Parking Required	62 Spaces (2.0 spaces / unit)
8. Off-Street Parking Proposed	76 Spaces (2.45 spaces / unit) 27 units have 2 car garages, 4 units have 1 car garages. Two and one space per lot counted respectively, plus 18 spaces in bays.

DEVELOPMENT STANDARDS

STANDARD	PERMITTED / REQUIRED	PROPOSED
Minimum Tract Area	20,000 sq.ft.	228,090 sq.ft. (5.23 acres)
Maximum Density	41 DU (8 DU / Ac.)	31 DU (5.9 DU / Ac.)
Setbacks:		
From SFD Zone	30'	30'
From Public Street	25'	160'
From Adjoining Lot		
End of proposed unit	10'	10'
Rear of proposed unit	20'	20'
Maximum Building Height	35'	35'
Maximum Building Coverage	35% of tract	Not more than 20% of tract
Minimum Green Area	50% of tract	Not less than 65% of tract
Off-Street Parking	2.0 Spaces per unit (62 spaces)	2.45 Spaces per unit (76 spaces)

General Notes

1. Boundary, topography and surface feature information shown on this plan are from M-NCPPC digital files - Tile #213NW8.
2. There are no known historic resources on this property.
3. This property is not within a Special Protection Area.
4. The site layout shown on this Schematic Development Plan is illustrative, and Applicant agrees that the building coverage, the green area, and the number, size and layout of the units may have to be revised at subdivision and site plan to protect the environment.
5. The Applicant acknowledges that conditions of approval at subdivision and site plan review may include measures intended to improve transportation capacity and traffic flow, including an additional turning lane from Seven Locks Road into the site.
6. Applicant to dedicate area as necessary at the time of subdivision to achieve 40 feet of right-of-way from the center line of Seven Locks Road.

The Applicant in the present case has proposed binding elements which limit development to a maximum of 31 one-family attached units, with a maximum building coverage of 20%, and a minimum green area of 65%. The Site Data and Development standards call for a density of 5.92 dwelling units per acre, a 160 foot setback from the public street and 76 parking spaces (54 in two-car garage units, 4 in one-car garage units and 18 in bays located in the central courtyard).

F. Master Plan

The subject property is located in the area covered by the *Potomac Subregion Master Plan*, approved and adopted in April 2002. The Master Plan does not designate the subject site for the R-T Zone, although it was so zoned, as mentioned above, from 1969 to 1973. Technical Staff reports that an assessment of the forest resources of the Potomac Subregion was conducted as part of the environmental resource analysis performed for the Master Plan. The subject property was identified as Preservation Category 2: "Riparian forest that has potential for some interior forest habitat (corridor width more than 600 feet)." The Burley property is 569 feet wide at the widest point, but it is contiguous with the Cabin John Regional Park forest, which contains a significant amount of Category 1 and 2 forest areas.

Technical Staff also notes that, during the County Council deliberations on the *Final Draft Potomac Subregion Master Plan*, the Council considered the Planning Board's recommendation to acquire the subject property as an addition to Cabin John Regional Park, in order to preserve and protect the forest and steeply sloped areas.⁴ After hearing from the property owner, the Council disapproved the Planning Board recommendation that the property be acquired and deleted it from the Master Plan. Nevertheless, the Master Plan expressly recommends, at page 13, that we

Preserve properties containing forested area . . . to prevent fragmentation or to maintain stream valley buffers. This may be accomplished under the current zoning, where it allows clustering of homes away from sensitive areas.

The Master Plan thus does not recommend any zoning change from the current R-90 Zone; however, the Master Plan is only a guide, and compliance with its recommendations is not mandatory unless the Zoning Ordinance makes it so. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). Since the provisions of the R-T 8 Zone (Zoning Ordinance §§59-C-1.7, *et seq.*) do not require compliance with the Master Plan, the question of whether or not to reject a requested reclassification due to lack of Master Plan compliance becomes a policy issue more than a legal question. Because the Planning Board recommended approval, a simple majority of 5 members of the Council is required for approval pursuant to Zoning Ordinance §59-H-8.2(b).

In sum, this development proposal is consistent with the Plan's recommendation of residential land use, but it is not consistent with its zoning recommendation, which call for retaining the R-90 Zone. Moreover, the proposal does not coincide with the Master Plan's call to "preserve properties containing forested area . . . to maintain stream valley buffers." The environmental impact of that fact will be discussed in Part III. I., below.

⁴ This was in addition to the two forested parcels (P400 and P455) immediately to the east of the subject site which were acquired for the Park from the Burley Estate in 1964.

G. Special Regulations and Development Standards of the Zone

Special regulations for the R-T 8 Zone are spelled out in Zoning Ordinance §59-C-1.72, beginning with the stated “Intent and Purpose” of the Zone in §59-C-1.721. The issue of whether the subject application comports with the intent and purpose of the R-T 8 Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

Although one stated intent of the R-T Zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping,” the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. The maximum number of units in a group is eight, and three continuous, attached townhouses is the maximum number permitted with the same front building line. Variations in the building line must be at least 2 feet.

Applicant’s illustrative SDP shows that these requirements can be met. The proposed development is comprised of five “sticks” of townhouses, one of seven units, and four of six units, for a total of 31 units. All the groups show the required two-foot variation in their front building lines. The proposed density for the submitted development is approximately 5.92 dwelling units per acre, though a density of 8 dwelling units per acre is permitted in the Zone.

Zoning Ordinance §59-C-1.723 is inapplicable because Applicant has not sought to combine R-T Zoned tracts with different residential zones; rather, Applicant seeks to have the entire subject site reclassified into the R-T 8 Zone. The Development Standards for the R-T 8 Zone are spelled out in Zoning Ordinance §59-1.73. As shown in the table below, the proposed development would meet or exceed the applicable development standards for the R-T 8 Zone.

Development Standards for R-T 8 Zone -- Code §§ 59-C-1.731 - 1.735

Development Standards for R-T 8 Zone		
Standard	Permitted/Required	Proposed
Minimum tract area	20,000 sq. ft. (0.46 ac.)	228,090 sq.ft. (5.2362 ac.)
Maximum density	8 units/ acre (41 max)	5.92 units/ acre (31 max)
Building setback requirements		
- Public street	25 feet	160 feet
- From adjoining lots (Side)	10 feet	10 feet
- From adjoining lots (Rear)	20 feet	20 feet
- From adjacent single family detached	30 feet	30 feet min
Maximum Building Height	35 feet	35 feet max
Minimum Green Area	50 percent	65 percent min
Maximum Building Coverage	35 %	20% max
Minimum Parking	2 spaces/ unit (62)	2.45 spaces/unit (76)

H. Public Facilities

Under the County’s Adequate Public Facilities Ordinance (“APFO,” Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and police, fire and health services will be adequate to support a proposed development, and in turn, whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council in the Annual Growth Policy (“AGP”) and biennially in the two-year AGP Policy Element. While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public

facilities in a rezoning case because the Council has the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the fact that the scope of Council's review is much broader at the zoning stage than that which is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of public facilities.

1. Transportation

Transportation Planning staff recommend approval of the subject local map amendment application, concluding that the rezoning will have no adverse impact on the area road network. Exhibit 46, page 12. However, Staff recommended that, at subdivision, consideration be given to requiring Applicant to dedicate 40 feet of right-of-way from the centerline of Seven Locks Road along the site's frontage, and to provide a left-turn lane from Seven Locks Road into the property's proposed roadway.

Under the 2003-05 AGP Policy Element, as of July 1, 2004, subdivision applications are subject to Local Area Transportation Review ("LATR") requirements.⁵ LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak hour of the morning and evening peak periods. As of July 1, 2004, an LATR traffic study is not required unless a proposed development would generate 30 or more peak-hour automobile trips.

Applicant did not call an expert in traffic engineering and transportation planning, but the Technical Staff report (Exhibit 46, page 12) indicates that the proposed 31 townhouse units would generate 14 trips in the peak hour of the weekday morning peak period (6:30 a.m. to 9:30 a.m.) and

⁵ The Policy Area Transportation Review (PATR) was eliminated by the Council in the FY 2003-05 Policy Element of the new AGP, for cases in which a completed application for subdivision is filed on or after July 1, 2004, and the PATR will therefore not be considered in this report.

25 trips in the peak hour of the weekday evening peak period (4:00 p.m. to 7:00 p.m.). Technical Staff also notes that these figures are higher than the number of peak-hour trips which would be generated by the existing R-90 zoning. According to Technical Staff, if the subject site were developed under the current zoning, there would be room for 15 to 18 single-family units, depending on the method of development and the environmental constraints of the site. The Technical Staff report indicates that 15 single-family units would generate 14 trips in the weekday morning peak hour and 17 trips in the evening peak hour. Eighteen single-family units would generate 17 trips in the weekday morning peak hour and 20 trips in the evening peak hour. Although the requested R-T 8 zoning represents an increase in traffic over the current R-90 zoning, Technical Staff opined that “the site is well situated with respect to major roadways with alternative routes over which the traffic can be dispersed.” Exhibit 46, p.12. Staff therefore concluded that “[t]he roadway network can adequately accommodate the amount of traffic proposed by the requested rezoning.” *Id.* at 12.

This conclusion is hotly disputed by the opposition, which presented both testimony and photographs to demonstrate traffic backups along Seven Locks Road at the subject site. The first witness on the point was the People’s Counsel, Martin Klauber, who did not take a position as to approval of the application, but rather testified about his own daily experience with traffic at this location. Mr. Klauber testified that he passes the subject site every weekday as he travels to work along Seven Locks Road. In his opinion, “the access shown on the schematic development plan from Seven Locks Road is absolutely unsafe” because of the congestion caused by cars queuing up as they try to cross Seven Locks Road in order to access the Heights School, the entrance to which is directly across Seven Locks from the planned access point for the subject site. Tr. 26. In response to a question by the Hearing Examiner, Mr. Klauber noted that “[t]here's back ups in the morning, and there's back ups in the evening” on Seven Locks Road. Tr. 31. On cross-examination by a neighbor, Steve Dye, Mr. Klauber indicated that there are also backups at Seven Lock’s

intersection with Democracy Boulevard. However, he did note that “[t]raffic is probably, so far as I can figure out, not at a standstill.” Tr. 32.

Steve Dye, who lives just north of the subject site in the Inverness North Townhouse development, testified that traffic was very heavy on Seven Locks Road (Tr. 127-144) and that “[c]ars will back up through several light cycles to try to make it through this intersection [with Democracy Boulevard],” sometimes blocking the intersection. Mr. Dye also submitted a written statement about the traffic (Exhibit 58), which he adopted in his testimony (Tr. 127), and eleven recent photographs of the traffic backups (all contained in Exhibit 59 and explained in Exhibit 60). Two of those photos are shown below, Exhibit 59(4), which shows southbound cars on Seven Locks Road backed up to the intersection with Democracy Boulevard at 8:20 a.m. on a weekday, and Exhibit 59(10), which shows northbound traffic on Seven Locks at about 8:00 a.m. near the spot where the access for the proposed development would be placed.



Southbound Traffic on Seven Locks Road, backing up from the light at Democracy Boulevard - Exhibit 59(4)



Northbound Traffic on Seven Locks Road, backing up near the planned access to the subject site- Exhibit 59(10)

Mr. Dye further testified that it was “not uncommon” for traffic to back up all the way to the subject site, partially because a police officer stops traffic to allow cars to turn into the Heights

School in that area. Tr. 133. He felt that it was dangerous for cars trying to turn into the Heights School, and that pedestrians were also at risk because the sidewalk does not extend the full length of Seven Locks Road in the area. Mr. Dye summed up his testimony in one bolded line from page two of his statement (Exhibit 58): “Traffic on Seven Locks Road is currently an absolute mess.” He indicated that other developments planned for the area will throw additional traffic onto the road in the future, and there is little room for additional lanes on Seven Locks Road. The stretch of Seven Locks where the development might occur is narrow and doesn’t have sidewalks, yet there are bus stops there, and bus riders stand on the shoulder to wait for buses. Mr. Dye reports that “anecdotally,” he knows that accidents are quite common on this stretch of road.

It is clear from the ruling of the Maryland Court of Appeals in *Tauber v. Montgomery County Council*, 244 Md. 332, 223 A.2d 615 (1966), that the Council may reject a rezoning application based on testimony of traffic problems, even though the proposed development passed an LATR type of review. In *Tauber*, the court, in upholding the Council’s rejection of the rezoning request, stated:

The Technical Staff of the Maryland-National Capital Park and Planning Commission recommended approval of the application but the Montgomery County Planning Board declined to accept this recommendation and recommended denial because in its opinion the request for rezoning was premature and would create “a potentially hazardous and undesirable traffic situation.” At the hearing on July 30, 1964, before the District Council, the applicants presented expert testimony indicating that the proposed development would not generate sufficient traffic to have a significant effect upon the operational safety of the adjacent streets. This opinion, however, was based upon a traffic count for one hour in the morning and one hour in the afternoon of February 7, 1964, at the intersection of Massachusetts Avenue and Westbard Avenue [*i.e.*, an LATR type of analysis]. Certain witnesses for those protesting against the granting of the application, testified that there were severe traffic conditions at the intersection. One witness testified that at times the traffic was backed up from the intersection in both directions for over one-half a mile and that there had been a number of accidents at what he described as a traffic bottleneck. There was other testimony on behalf of the protestants indicating a dangerous traffic condition at the intersection which would be aggravated by the erection of the proposed apartment house.

The rationale of the *Tauber* decision was also applied by the Court of Appeals in the context of an application for rezoning to the R-T Zone, in *Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969).

Even though the Applicant in the instant case has met the LATR standards without a traffic study, the Hearing Examiner is quite concerned that the evidence shows a traffic congestion problem on Seven Locks Road, and there is no traffic study to refute that evidence. The comments of Transportation Planning Staff seem to be based on overall conclusions about the area roadways and on the relatively small number of trips to be generated from this project. The evidence in the case, from Mr. Klauber and Mr. Dye, indicates that traffic congestion is a problem in this area and that the proposed development will make it worse, and possibly dangerous. Applicant has acknowledged, in General Notes (not binding elements) on the SDP (Exhibit 89(a)), that “conditions of approval at the subdivision and site plan review may include measures intended to improve transportation capacity and traffic flow, including an additional turning lane from Seven Locks Road into the site.”

The Hearing Examiner is concerned that this acknowledgement may not be a sufficient commitment by Applicant to make any changes or improvements that the Planning Board feels would alleviate traffic congestion in the area. Absent a binding commitment by Applicant, the Planning Board might be reluctant to push the Applicant to take steps to relieve traffic congestion (as distinguished from improving traffic safety), in view of the fact that the proposed development already meets LATR standards. Moreover, it is by no means clear on the record that all of the traffic problems can be alleviated, given the location of the Heights School entrance directly opposite the subject site. There is no evidence in this record that moving the proposed access for the subject site would remedy the problems Mr. Klauber testified about without creating other, perhaps more serious, traffic problems. If this case is remanded by the Council, the Hearing

Examiner recommends that it be done, in part, to allow Applicant the opportunity to present expert evidence on this point.

2. Utilities

Technical Staff stated in its report that water and service categories are W-1 and S-1, respectively, and that local service is deemed adequate. See Staff Report at 5. Alfred Blumberg, Applicant's expert in land planning, testified that the property is served by adequate public facilities. Water and sewer services are available to the property. Police and fire stations are within reasonable distances to service the proposed development. Tr. 176-178.

3. Schools

Mr. Blumberg testified that the relevant schools are in the Churchill Cluster, and based upon standard pupil generation rates, 31 townhouses will generate 8 elementary school students, four middle school students and five high school students. The Annual Growth Policy (AGP), according to Mr. Blumberg, has determined that the Churchill Cluster has adequate capacity to support additional development. Tr. 175. This assertion is supported by the June 10, 2003 letter of Joseph J. Lavorgna, the Director of Planning and Capital Programming for the Montgomery County Public Schools, as amended by the March 23, 2005 telephonic update from Bruce Crispell, Demographic Planner, Montgomery County Schools (Exhibit 75(a)).

Mr. Lavorgna stated in his letter that the subject property is located within the Bells Mill Elementary, Cabin John Middle School and Churchill High School service areas. As of the date of Mr. Lavorgna's letter, all three were over capacity, as measured by MCPS, with the high school and elementary school projected to remain over capacity for the six-year forecast period, while the middle school was projected to remain near capacity. Nevertheless, both Mr. Lavorgna and Mr. Crispell stated that the AGP finds capacity to be adequate in the Churchill Cluster. Mr. Crispell also noted that the modernization of Bells Mill Elementary had been added to the Capital

Improvement Program, “with a larger capacity anticipated by 2010.” The numbers of students now projected from the proposed development is the same as was testified to by Mr. Blumberg.

The hearing examiner concludes that the relevant schools are crowded, but not over capacity using the Council’s yardstick.

I. Environment

Both forest conservation and stormwater management are significant issues in this case. As can be readily seen from the photo on page 8 of this report, the subject site is heavily forested. As mentioned in Part III.F. of this report, the Master Plan seeks to preserve “*properties containing forested area.*” However, the Council elected not have the Master Plan specify that the subject site should be acquired for park purposes, so we have to assume it may be developed with residential units even under the present R-90 Zone, and that would also result in destruction of forest. It is not clear from this record that the proposed townhouse development under the R-T 8 Zone would cause significantly more destruction of forest than a detached-house development under the R-90 zone. Given the Council’s determination not to require preservation of this property as parkland, the Hearing Examiner finds that rezoning to the R-T 8 Zone would not cause an inappropriate loss of forest.

The thorniest factual and policy issue in this case involves the possible impact on the environment from inadequately controlled stormwater runoff. Both Technical Staff and the Planning Board, although recommending approval of the rezoning, expressed reservations about the potential environmental impact of the development.⁶ As stated by the Planning Board (Exhibit 49):

⁶ Technical Staff suggested in its report that, in order for the Council to approve the proposed rezoning, it would have to make the five findings set forth in Zoning Ordinance §59-D-1.61, including a finding, specified in §59-D-1.61(d) that “[a]ny applicable requirements for forest conservation under Chapter 22A and for water resource protection [*i.e.*, stormwater management] . . . [have been] satisfied.” Admittedly, the Zoning Ordinance is not entirely clear on whether the five specific findings are required for a development under the “Optional Method”, pursuant to Zoning Ordinance §59-H-2.5. In the past, rezoning applications under the Optional Method, which calls for a schematic development plan rather than a development plan, have not been subjected to the requirement for the five specific findings called for in Zoning Ordinance §59-D-1.61. That provision, by its own terms, applies to “an application for classification in any of **these zones**,” and the term “these zones” is a reference to zones listed in §59-D-1.1, which do not include the R-T zones. In the R-T zones, the Optional Method is permitted and a Development Plan is not required. In contrast, in the §59-D-1.1 zones, a development plan, not a schematic development plan, must be submitted, and the greater detail of a

The Planning Board agreed that the schematic development plan was compatible with adjacent development in terms of unit type, density, and setbacks, but indicated concern regarding preservation of natural features and erosion control, topics highlighted by neighboring citizens in their testimony. During discussion, the Planning Board agreed with staff that the indicated layout of the development was not a binding element and, in the event of the application obtaining the approval of the District Council, the layout must be revised during the preliminary plan and site plan process to meet environmental requirements. Because of the steep slopes and natural features of this site, proposed site grades, slope maintenance, stormwater management facilities, drainage swales, access to the rear of several properties, proposed landscaping, and protection of critical root zones will need to be closely scrutinized at later stages of the development process. Some or all of the units may need to be reduced in size or the number of units cut to meet all site plan requirements, pending a level of engineering detail not available at the schematic development stage.

Technical Staff was satisfied that its environmental concerns would be addressed because “[t]he Montgomery County Department of Permitting Services has granted concept approval to the applicant’s stormwater management plan while environmental staff analysis indicates that the forest conservation threshold can be met with a revised layout during the preliminary plan and site plan process.” Exhibit 46, page 8. Although environmental staff may be able, at Site Plan, to revise the site layout to meet forest conservation concerns, testimony at the hearing and subsequent filings have left the Hearing Examiner less than confident that DPS will be able to resolve the stormwater management problems in a way that will meet the regulatory requirements for water resource protection.

To support its claim that it had satisfied all stormwater management requirements, Applicant introduced its Stormwater Management Concept Plan (SWMCP, Exhibit 37(c)) for the subject site,⁷ and the testimony of Richard R. Brush, Manager of the Water Resources Plan Review Section of DPS. Mr. Brush was a forthright witness, who gave some surprising testimony.

development plan allows the closer Council review evidenced in the five required findings. In schematic development plan cases, it is contemplated that the detailed review will take place at site plan and subdivision. The Council’s review in such cases, including the subject case, considers the requirements and purpose of the zone, compatibility and the public interest. Nevertheless, most of the issues raised in the five findings are considered here because, in order to satisfy the Zone’s Purpose Clause in this case, Applicant must prove that the site is “appropriate for residential development at densities allowed in the R-T Zones,” a criterion which requires analysis of the likely impact on public facilities and the environment. Moreover, the public interest review is quite broad, addressing the Master Plan’s recommendations and the development’s potential effects on public facilities and the environment.

⁷ The SWMCP discussed at the hearing was updated at the Hearing Examiner’s request to reflect the 31 dwelling units planned for the development. The new plan, reviewed by DPS after the hearing, is in Exhibits 77(a-e).

Mr. Brush first explained that there are several facets to storm water management. One is called the “control of the channel protection volume.” That is a “quantity type of control.” It is meant to provide protection to the stream channels when runoff finally gets to the actual streams. It controls the amount of runoff to prevent stream channel erosion. A second facet of storm water management is to treat the runoff, so that it leaves the site as clean as possible, by removing pollutants. Treating the runoff is “quality control.” Thirdly, there is a requirement for “recharge,” to replenish ground water, which maintains the base flow of streams, and that was included in this case in addition to quantity and quality controls. Tr. 41-42.

Mr. Brush further testified that DPS gave Applicant “a partial waiver of the channel protection volume.”⁸ Tr. 43. On cross-examination, Mr. Brush testified that the waiver of quantity controls (*i.e.*, channel protection volume) is the result of an engineering problem regarding the release rate of the water. In order not to release too much water, the release pipe used in the stormwater facility would have to be narrow, but if it is too narrow (less than 2 inches in diameter), it would tend to clog. Since the needed release rate would have called for a pipe smaller than the two inch minimum, DPS issued a partial waiver for the amount of storage that would be released by increasing the pipe diameter to two inches. The State actually uses a three inch diameter standard. The waiver was granted, not because Applicant was seeking to avoid the requirements, but because “they couldn't physically do it . . . [given] the engineering [issues], the size of the structure.” Tr. 56-57.

Mr. Brush further testified that even if Applicant had proposed an above-ground storage facility instead of an underground storage facility, the waiver still would likely be needed because of the concentration of runoff all into one area. Tr. 59.

Mr. Brush's testimony as to the nature of DPS's review is illuminating. Tr. 77.

⁸ After Applicant submitted its revised SWMCP (Exhibit 77(a-e)) following the hearing, DPS approved a total waiver of channel protection volume (*i.e.*, quantity control) (Exhibits 79(a) and 80).

We at the Department of Permitting Services don't look at site layout. We don't look at zoning. We don't look at anything like that. We basically look at what has been given to us as has been allowed through the zoning process, and been allowed by others and try to make that work. That's really what we try to do. If it can't work completely, then a waiver has been granted. We don't deny concepts based on land use issues or land use decisions. If a land use decision has been made, let's say in this case, to go with townhouses, and a partial waiver is needed to make that work, that's what we'll grant. But we're not making a land use decision. We're not going to deny a concept and say, oh no, you can't do that, because that's not our role to do that. [Emphasis supplied]

In other words, approval of a SWMCP by DPS does not mean that the developer will meet all the statutory water protection requirements. Rather, DPS will require the best stormwater management facilities feasible for a given site, and will waive any requirements that cannot be met by this effort. Tr. 77-80. Apparently, DPS will not disapprove a proposed development even though it fails to meet important stormwater management requirements. Presumably, that means that even if a proposed development would fail to meet all applicable standards, thus resulting in stormwater runoff onto another's property, DPS does not view it as its job to prohibit the new development. Rather, DPS reasons that a project approved by the Planning Board and the Council should be permitted to go forward even if it cannot meet water quantity and quality standards.

Our assumption has always been, in this type of case, that stormwater management problems observed at the zoning stage of development would be remedied at Site Plan or Subdivision. The sobering fact, established by the testimony in this case, is that no such remedy will be forthcoming unless the development proposed by the Applicant to DPS is significantly modified. DPS apparently does not require an Applicant to change its development plans in order to make the development more susceptible to effective stormwater quantity controls. It just requires the best protection feasible for the development plan presented. During the cross-examination of Mr. Brush, Mr. Francis Cameron, who lives just to the south of the proposed development, asked about the Site Plan review. The exchange is instructive. Tr. 78-80.

BY MR. CAMERON (as rephrased by the Hearing Examiner): . . . [O]nce you get to the site plan stage, would you still have the same approach as you just enunciated for this stage?

THE WITNESS: Yes. Yes.

BY MR. CAMERON:

Q And that approach is if a waiver is needed to meet the requirements that you just give the waiver?

A Yes. If there is no possible way of providing onsite management given the land use on a particular site, then a waiver would be granted.

Q What is the objective of the, having storm water regulations then if you can't meet them then you just give a waiver?

A Well, typically only a partial waiver is granted, if granted at all. . . .

Q So that when we get to the site development plan, there's been a lot of talk about this is only a concept and a lot of concerns to be addressed at the site development plan stage, but what I hear you saying is that at the site development plan stage if there, if the plan, whatever the final plan turns out to be, if it doesn't meet the storm water management regulations then what the neighboring property owners can expect is that there'll be a waiver granted and possibly some money paid into a fund by the developer.

A Yes. Uh-huh. . . . If storm water management can be provided given the land use all on site, then no waiver would be required. So if various changes in location were made to locating houses, parking lots, whatever, that may or may help in providing total on site storm water management, it may not. I'm not sure.

Thus, even at Site Plan review, excess stormwater runoff will not be eliminated.

Because the SWMCP that DPS had approved for the subject site prior to the hearing contemplated 27 dwelling units, not the 31 units contained in the revised SDP, the Hearing Examiner required Applicant to submit a new SWMCP to DPS for its review. Applicant did so, and the result of that review was approval by DPA with a total waiver of all stream channel protection (i.e., water quantity) controls. Mr. Brush candidly explains this approval and waiver in two memoranda to the Hearing Examiner (Exhibits 80 and 85). In essence, stream channel protection cannot be effectively provided on site with the current SDP, so DPS is instead requiring increased water quality control, including a doubling of the groundwater recharge requirement. While this may be a perfectly reasonable way to make the best out of a bad situation concerning stormwater quantity controls, the Council must decide if a development without stormwater quantity controls in the Cabin John Creek Watershed is in the public interest.

Francis Cameron testified that he lives in Turning Creek Development, which is south of the proposed development, and one of his concerns is the possibility of erosion. “We are at the bottom of the slope there and when I sit in my house during a rain storm and look across the street and up that hill, there's lots of water that pours out of there now and muddy water, it comes down through my across the street neighbor's side yard and his yard is pretty much denuded of grass, and I worry about the fact that the proposed development will exacerbate that particular problem. As Ms. Mayo talked about, at least for the one [area,] flow would be increased by three with the proposed development, so I am concerned about that . . .” Tr. 256.

The evidence in this case is that excessive stormwater runoff will be harmful to the environment and the neighboring property. Mr. Brush, in the penultimate paragraph of his May 2, 2005, memorandum to the Hearing Examiner (Exhibit 80), stated, *inter alia*, that “ the overall condition of this segment of the Cabin John Creek is rated as fair. Existing and past erosion of the stream channel and loss of biological habitat appear to be the major problems. The stream is categorized as in need of stream restoration.”

Lynn Mayo, a professional engineer, testified as an expert in water resources, including stormwater management. Tr. 224-228. Ms. Mayo testified that a large percent of the subject site does not drain to any storm water management facility, as illustrated by the color purple in her rendering of the SDP in Exhibit 68. Based on the SWMCP for the 27 unit development, which was the one that had been approved by DPS prior to the hearing, Ms. Mayo had concluded that sixty-two percent of the site would not receive any channel protection, sixty-two percent of the site would not receive any recharge value, and thirty-five percent of the site would not drain to a water quality treatment facility. Tr. 228-230. According to Ms. Mayo's calculations, the stormwater flow in a two year event would increase threefold due to increased imperviousness. The result would be significantly increased erosion on Turning Creek land. Tr. 233-235.

Ms. Mayo testified that decreasing the level of imperviousness on the subject site would reduce the water runoff and decrease damage to the environment. When asked where do you draw the line, Ms. Mayo suggested that the Maryland regulations set the limits on runoff, but that DPS had agreed to waive the regulations, in part, since the proposed townhouse development could not fully meet them.⁹ Tr. 237-238. In Ms. Mayo's opinion, "the acceptable number of units would be the maximum number of units they can get without having to waive storm water management requirements." Tr. 241.

Applicant did not produce any evidence demonstrating that the water runoff from the subject site, without any quantity controls, would not harm the environment, and the complete waiver contemplated in this case is tantamount to an exemption from the requirements that ordinarily apply to protect the environment.

Applicant did produce evidence that the proposed townhouse development in the R-T 8 Zone would produce less environmental disturbance than a single-family detached development in the present R-90 Zone because the latter would require a public access road, and public roads must be built to standards which involve more disturbance to the land. When developing in the R-90 Zone, a public road would be required because Zoning Ordinance §59-C-1.322 specifies that lots in the R-90 (single-family detached) Zone must have 25 feet of frontage at an existing or proposed street line. As testified by Applicant's zoning expert, Alfred Blumberg (Tr. 157-165), there is no corresponding frontage requirement in the RT-8 (townhouse) Zone, and therefore Applicant may use a private access road, which does not have to meet the same standards as a public road. As a result, less grading would be required. According to Mr. Blumberg, Exhibit 63 shows that there is at least a full acre more open space and forest save with the townhouse development than either of the single family detached plans (Exhibits 61 and 62). Thus, Applicant argues that her proposal

⁹ It should be remembered that this partial waiver was granted for the proposed 27 unit development. When DPS reviewed the 31 unit plan after the hearing, it granted a full waiver from all channel protection requirements. Exhibits 79 and 80.

would disturb the environment much less than the alternative of a single-family detached development, which the owner would have a right to develop under the current residential zones.

Applicant's theory was greatly undermined by the testimony of Ms. Mayo. She testified that, according to a publication of the United States Department of Agriculture, "*Technical Release 55*," under the heading "Urban Hydrology for Small Watersheds" (Exhibit 74), the average percent of imperviousness in townhouse developments is 65%, while in single family detached developments of ¼ acre per unit, the average percent of imperviousness is a much lower 38%. Tr. 245-246. Ms. Mayo also introduced a graph (Exhibit 73) produced by the "Center for Watershed Protection," demonstrating that, even with best management practices (BMP), stream quality decreases dramatically as imperviousness increases. Tr. 243-247. Ms. Mayo concluded that because the subject site is only about 500 feet away from the Cabin John Creek, a 31 unit development would risk damaging that stream. Tr. 247.

Even if the Hearing Examiner credits Applicant's evidence that the need for a public road in an R-90, detached, single-family development would result in more grading, it appears likely from Ms. Mayo's testimony and exhibits that a townhouse development would end up with more impervious surfaces, and the level of imperviousness correlates directly with the amount of water runoff and erosion which could be expected to affect adjacent properties (Tr. 233-238) and with decreases in the nearby Cabin John Creek's water quality (Exhibit 73).

Even more telling however, is the testimony of Mr. Brush on the issue. He testified that "if the site were reconfigured [with] . . . single family houses, a lot of that channel protection volume would be done through nonstructural type controls, [and] therefore, the standard would be met without a waiver being given." Tr. 59. According to Mr. Brush, "In general, . . . the concentration of an impervious area for single family houses is spread throughout a subdivision rather than being concentrated in one area. Therefore, the ability to use nonstructural controls is greater for single

family houses.” Tr. 60. Although Mr. Brush noted that comparisons are difficult without seeing the actual site plans (Tr. 61-62), his general statement conveys the sense that stormwater runoff can be more easily handled, without waivers, in developments with detached single-family houses. The level of imperviousness is “the real key” in determining whether waivers will be required. Tr. 67.

Weighing all the evidence in this case, the Hearing Examiner must conclude that the proposed rezoning would be harmful to the environment, even without considering the large amount of forest which will be cut. While the loss of trees would be considerable, the Hearing Examiner did not consider that factor in his environmental conclusion because there might well be a roughly equivalent tree loss if Applicant developed her property under the current R-90 Zone with single-family detached units.

However, the lack of stormwater management envisioned here is critical. As stated by the People’s Counsel, “That storm water management concept [plan for the subject site] . . . has to work . . . or the theory of 31 townhouses has to be adjusted.” Tr. 20. After the second review by DPS, we are left with no storm water management for channel protection because it has all been waived. It therefore cannot work, and as suggested by Mr. Klauber, “the theory of 31 townhouses has to be adjusted.” Applicant’s land use expert, Alfred Blumberg, assumed, in his testimony, that there would be quantity controls. He testified that, because of the storm water management controls, there will be less runoff from the subject property onto Turning Creek Townhouses after the proposed development than there is today. Tr. 194. According to Ms. Mayo, Applicant was incorrect in suggesting that after development of townhouses on the property, there would be less water runoff onto the Turning Creek property than before. Tr. 254. While this conflict in the evidence might have created an issue at the hearing, which took place prior to DPS’s decision to waive all quantity controls, the Hearing Examiner does not see how the stormwater runoff situation can possibly be

better after the development is built, given DPS's total waiver, following the hearing, of all quantity controls on stormwater runoff. That is the situation we face in this case.

The Hearing Examiner finds this stormwater runoff problem makes the currently proposed 31 townhouse development inappropriate, given its environmental effects. Applicant's own expert witness testified that "any soil will erode if you have a volume of water rushing over it that's not controlled." However, he opined that there would be "intense scrutiny for this property, and [that] we're going to have to meet every county standard and requirement as far the sediment erosion control or storm water management." Tr. 180.

In fact, the evidence is that the property will not have to "meet every county standard and requirement" because DPS has granted it a complete waiver of water channel (*i.e.*, quantity control) requirements, on the theory that there is no efficient way of providing adequate quantity controls in the current 31 unit configuration. DPS presumably could have said, "Sorry, you must meet the channel protection standards or you cannot build the proposed project on this site." We heard from Mr. Brush that, as a matter of policy, DPS does not take that approach. Rather, it gets the best practical facility it can on a given site, and then it waives any requirements that cannot be met. Whether that policy best serves overall County interests is for the Council to determine, but we should not be fooled into thinking that the stormwater problems in this case will go away at site plan. Mr. Brush was quite clear in stating that DPS's approach would be the same at that review. Tr. 78-80.

Considering all the evidence, the Hearing Examiner cannot find the proposed 31 unit townhouse development to be appropriate, based on its environmental impact.

J. Community Concerns

1. The Neighbors:

Opposition from the community consists of the testimony of three neighbors and a plethora of letters, one from the Inverness North Homeowners Association, one from a volunteer environmental group called “Friends of Cabin John Creek Watershed,” and the remainder from concerned neighbors. The following is a summary of their concerns:

- Traffic on Seven Locks Road is already too heavy and backs up during rush hour.
- The area schools are all over-crowded.
- Stormwater Management problems:
 1. Proposed development would not meet the requirements of Zoning Ordinance §59-D-1.61 (Prevent erosion and preserve natural vegetation)
 2. Current Stormwater Management Concept Plan calls for 27 units, but that has increased to 31, thus increasing impervious area
 3. 31 units is too dense, causing erosion on slopes and tree loss
 4. SWMCP and DPS review show townhouses would have more impact on Cabin John Stream than single family homes
 5. Rezoning to townhouses requires the County to waive Maryland Dept of Environment (MDE) Channel Protection Storage and Water Quality requirements. Such a waiver is not appropriate for a site adjacent to Cabin John Stream
 6. Townhouse development requires an underground stormwater facility which is more costly to maintain and would not be required for single family development
 7. The 27-unit SWMCP does not adequately protect the Cabin John Stream.
 - a) 3.7 of the 5.1 acres will be disturbed.
 - b) The Plan would collect runoff from only 1.4 acres in a single channel protection storage facility. Thus 62% of the site will not receive any channel protection.
 - c) Likewise only one recharge facility will be provided which means that 62% of the site will not receive any recharge volume.
 - d) Two water quality facilities will treat only 2.4 acres, leaving 35% of the site not draining to a water quality treatment facility
 - e) Applicant has not shown the calculations for the claimed Natural Area Conservation Credit (MDE Credit #1), which may not meet all the Water Quality Storage Volume requirements and therefore should not be used
 - f) Two other credits Applicant seeks (Disconnection of Rooftop Runoff, MDE Credit #2, and Sheet Flow to Buffers, MDE Credit #4) and are also improper since Credit # 2 requires a waiver and the site does not meet the requirements (a 50 foot buffer) for Credit #4.
 - g) The proposed trench to provide recharge in the western drainage area, at 256 cubic feet, does not meet the computed recharge volume requirement
 - h) There is no computation for the required recharge volume for the eastern drainage area. A recharge volume facility is required for this area
 - i) Channel Protection is only provided for 1.4 acres. The western watershed

drains to a single point at the southwestern boundary of the property, and therefore channel protection should be provided for 4.2 acres.

8. Developing on the steep slopes will result in too much erosion. The soils on this property all erode easily. Current slope is 4H:1V. The proposal calls for slopes of 2H:1V, ensuring erosion.

- Blasting, excavation and construction will adversely affect the community
- The steep slope of the new road would be a hazard as it enters Seven Locks Road, especially in severe weather conditions
- The *Potomac Sub-Region Master Plan* calls for keeping the current R-90 zoning.

The traffic, schools and environmental issues are discussed at some length in the preceding sections. The issue regarding Master Plan recommendations was also discussed above. The concern about blasting and excavation was alleviated by the testimony of Alfred Blumberg, Applicant's land use expert, who stated that given the soil conditions, neither blasting nor unusual excavation will be required. Tr. 91-92. The testimony also established that the driveway slope would be no greater than some other driveways in the area.

2. The People's Counsel:

Martin Klauber, the People's Counsel, gave an opening statement (Tr. 19-23) in which he observed that this case is a "close call." As to stormwater management, he stated:

That storm water management concept [plan for the subject site] . . . has to work . . . or the theory of 31 townhouses has to be adjusted.

* * *

Mr. Klauber also gave sworn testimony in the case concerning traffic near the subject site. Tr. 26-35. In addition to confirming that there are traffic backups on Seven Locks Road, he testified that the planned location of the access to the subject site "is absolutely unsafe" because of its placement opposite the entrance to the Heights School.

IV. SUMMARY OF HEARING

A. Applicant's Case in Chief

Alfred S. Blumberg:

Alfred S. Blumberg testified as an expert in land use planning. He calculated the average slope on the subject site as 16.5%. Tr. 83-86. The frontage along Seven Locks Road is 460 feet, and the property runs about 570 feet deep towards Cabin John Park on the east. About 75% of the site is forested. There are three distinct forest areas on the property and three soil types. Tr. 87-89.

According to Mr. Blumberg, none of these soils is considered "severely erodable" on M-NCPPC's Environmental Guidelines Erodible Soils List – Appendix C, page 67 (Exhibit 56). The List does say that the soils "erode easily." 90-91. Mr. Blumberg testified that, given the soil conditions, neither blasting nor unusual excavation will be required. Tr. 91-92. He also stated that there was nothing unusual or "untoward" about this property, and the driveway slope would be no greater than some other driveways in the area. Moving the proposed access location would be a complex matter, but it will be determined at preliminary plan of subdivision. Tr. 93-95. The question about adding storage lanes for turns off of Seven Locks Road will also be discussed at that time. Tr. 96-98.

Mr. Blumberg described the neighborhood, with its numerous townhouse communities, and agreed with Technical Staff's proposed "surrounding area" definition, except on the northern end. In Mr. Blumberg's opinion, Technical Staff's "surrounding area" extended too far to the north, and should have ended at Bells Mill Road. Tr. 99-102. In support of his opinion, Mr. Blumberg observed that "[t]here's nothing north of Bells Mill Road that in any way would be impacted by or affected by or visually even see the subject property." Tr. 102. He also testified that the Council had accepted a "surrounding area" description bounded by Bells Mill Road on the north when it

considered LMA G-326, the rezoning of Turning Creek Townhouses, the property immediately to the south of the subject site. Tr. 101.

Mr. Blumberg described the subject site, and indicated that a private roadway, with retaining walls, would be built to access the development. Tr. 103-106. In Mr. Blumberg's opinion, a 31 unit townhouse development would be compatible with the environment, and Applicant will save a fifty foot wide buffer of forest, in a forest conservation easement, on the northern end of the property. Tr. 109.

He then discussed the binding elements, noting that Applicant was limiting itself to 31 units, a building coverage which is 15 percent lower than the maximum, and green area 15 percent above the minimum. Tr. 110-111. He noted that the site would provide more parking than required. Various specimen trees, including a Kentucky coffee tree, would be saved, though others would be lost. Tr. 113-114. If the project were reduced to 27 units, it is possible that additional specimen trees would be saved, but that is not likely according to Mr. Blumberg's understanding of Technical Staff's thinking. Tr. 114-116.

Mr. Blumberg feels that the Council was correct in refusing to include a recommendation in the Master Plan to turn the subject site into parkland, because "it fits better into the fabric of the community by incorporating it into the townhouse development that's occurred on both sides of Seven Locks Road." Tr. 123. Because the Master Plan does not recommend using the property as parkland, but rather recommends continued residential use, Mr. Blumberg opined that, "in a way . . . it does comport with the guidelines of the master plan." Tr. 124-125.

Mr. Blumberg testified that the subject site was not "designated" by the Master Plan for the R-T 8 Zone, nor is it transitional. However, in his opinion it meets the appropriateness test in the purpose clause of the R-T Zones "because of the context of the surrounding area and the immediately abutting properties." Moreover, this property was actually zoned R-T 12.5 back in

1969. Four years later, in July of 1973, in zoning case F903, the property was rezoned back to R90 from the R-T 12.5 Zone at the request of the property owners. The taxes in the RT Zone ground were a burden on them, and they requested to have a rezoning set back to the R90 zone to reduce their tax burden. That was granted by zoning case F903, back in July 1973. Tr. 143-147.

Mr. Blumberg noted that, under the Zoning Ordinance, the intent of the RT zones to provide “maximum amount of freedom possible in the design of townhouses and their grouping and layout.” Another “intent” is to provide in such developments the amenities normally associated with less dense zoning categories. Mr. Blumberg reads that to be “areas of open space, areas of yards and common space for recreational activities, and for enjoying the natural environment.” He pointed out that each of the lots associated with the planned townhouses does provide for a back yard, as well as a front yard. There is a large area of open space in the center of the property which will be utilized as a meeting and greeting area by the residents. There are common amenities that might be found in a less dense zoning category, so in his opinion, the proposed use does provide such amenities. The third “intent” of the zone is to permit the greatest possible amount of freedom in the types of ownership for townhouses and townhouse development. Applicant proposes that these will be fee simple townhouses, and Mr. Blumberg believes that is the type of freedom of ownership that was intimated in the “intent” portion of the R-T Zone’s requirements. Tr. 147-148.

Mr. Blumberg further opined that this proposed development is very compatible and similar to the other developments that currently exist in the neighborhood, and that this development would “stabilize” a property that has been undeveloped and “will create a land use pattern that's compatible with the adjacent properties.” He described the subject site as the “hole in the middle of a donut,” because all the properties around it have already been developed, with parkland to the east, townhouses north and south, a school and other townhouse developments to

the west. So this project “will fill in the land use with an appropriate and compatible use in the middle . . . , fit[ting] very well into the texture.” Tr. 149.

As to traffic, Mr. Blumberg noted that the number of trips that would be generated by this development in the morning peak hour would be 15 trips. In his opinion, adding 15 trips over the course of one hour would not adversely affect the neighborhood, and any problems could be rectified at site plan and subdivision. Tr. 150. Mr. Blumberg further testified that the project meets all the applicable development standards. Tr. 154.

Mr. Blumberg next testified to a comparison of the present plan for 31 townhouse units (Exhibit 63) with a theoretical developments of 17 (Exhibit 61) and 18 (Exhibit 62) detached single-family homes on the same site. The comparison was intended to compare common open space, and no attempt was made to compare stormwater management facilities that would be required. Also affecting the comparison was the fact that R-90 developments, unlike R-T developments, must have frontage on a public street. Because a residential public street has to have at least a 50 foot right of way, with 20 or 24 feet of pavement and sidewalks, curbs or drainage swells, the impact on the environment would be greater than for a private driveway, which can be just 20 feet of the paving. According to Mr. Blumberg, Exhibit 63 shows that there is at least a full acre more open space and forest save with the townhouse development than with either of the single family detached plans (Exhibits 61 and 62). Tr. 157-165.

As to the steepness of the driveway, Mr. Blumberg testified that the current plan called for a maximum grade of 11 percent, which is below the county standard for a public street (between 14 and 12 percent) and consistent with the range of other nearby developments. Tr. 166. He noted that the townhouses in Inverness North are very much closer to Seven Locks Road than the proposed development. Turning Creek likewise has townhouses that abut Seven Locks Road, and they are set back approximately 50 to 60 feet from the right of way line. The subject townhouses

are going to be set back much farther, and from a compatibility prospective along Seven Locks Road, Mr. Blumberg opined that they would be “pretty much invisible” because they're going to be up the hill and they're going to be set back and landscaped. Tr. 168.

In Mr. Blumberg's opinion, the proposed townhouses are also compatible with the abutting parkland, since the townhouse communities to the north and south also abut the parkland. Tr. 169. As part of Applicant's forest conservation plan, she will be reforesting about .75 acre of land. Tr. 170-171.

Mr. Blumberg further testified that the property is served by adequate public facilities. Water and sewer services are available to the property. Police and fire stations are within reasonable distances to service the proposed development. Tr. 176-178. Mr. Blumberg testified that the relevant schools are in the Churchill Cluster, and based upon pupil generation rates, 31 townhouses will generate 8 elementary school students, four middle school students and five high school students. He stated that although they are all over capacity according to Montgomery County Public Schools, the Annual Growth Policy (AGP), according to Mr. Blumberg, has determined that the Churchill Cluster has adequate capacity. Tr. 175. Mr. Blumberg concluded that, in his opinion, there are adequate public facilities to serve this proposed development. Tr. 178. Also, in his opinion, 31 units do fit comfortably on the property. Tr. 180.

When asked by the Hearing Examiner about erosion on the slopes and tree loss, Mr. Blumberg stated that “any soil will erode if you have a volume of water rushing over it that's not controlled.” However, he opined that there would be “intense scrutiny for this property, and [that] we're going to have to meet every county standard and requirement as far the sediment erosion control or storm water management.” Tr. 180.

On cross-examination, Mr. Blumberg testified that, because of the storm water management controls, there will be less runoff from the subject property onto Turning Creek

Townhouses after the proposed development than there is today. Tr. 194. He also indicated that of the 19 significant trees (*i.e.*, those with a trunk diameter of 24 inches or more) on the subject site, only six would remain if the 31 townhouse development went forward. Tr. 200. The forest conservation requirements differ between townhouse developments and single-family detached developments, with a slightly different percentage of tree save and reforestation required. Tr. 204-205.

B. Opposing Testimony

1. Lynn M. Mayo, P.E.:

Lynn M. Mayo, a professional engineer who lives in the North Inverness Townhouse community just north of the subject site, has a Masters Degree in water resource management and testified as an expert in water resources, including stormwater management. Tr. 224-228.

However, first she testified about forest conservation questions. Based on her calculations, Ms. Mayo estimated additional significant trees would be lost due to disturbance of their critical root zones if the townhouse development had 31 units instead of 27. Ms. Mayo introduced two rendered diagrams (Exhibits 65 and 66) to illustrate this point. Tr. 208-211.

Ms. Mayo also relied on a Technical Staff report prepared on July 25, 2003 (Exhibit 67) when the plan was to construct a 30 unit townhouse development. She argued that because Applicant had not updated her Forest Conservation Plan (Exhibit 37(b)) after the proposed development grew to 31 units from 27, the language in the older staff report, evaluating a 30 unit development still applied. Over objection, Ms. Mayo testified that the old Technical Staff report determined, at the time, that the SDP did not meet forest conservation requirements for a number of reasons.¹⁰ Tr. 212-224.

¹⁰ The latest Technical Staff report (Exhibit 46), dated March 23, 2005, took a different stance, arguing that environmental concerns, such as forest conservation, could be met at Site Plan review.

As to stormwater management, Ms. Mayo testified that a large percentage of the subject site does not drain to any storm water management facility, as illustrated by the color purple in her rendering of the SDP in Exhibit 68. Based on the SWMCP for the 27 unit development, which was the one that had been approved by DPS prior to the hearing, Ms. Mayo concluded that 62 percent of the site would not receive any channel protection, sixty-two percent of the site would not receive any recharge value, and thirty-five percent of the site would not drain to a water quality treatment facility. Tr. 228-230.

Ms. Mayo introduced another rendered version of the SDP (Exhibit 69) to show an area of stormwater runoff along the southwestern border of the subject site, adjacent to the Turning Creek Townhouse development, as it is now. The green color shows forest and the orange shows grass. According to Ms. Mayo, even without a any development on the subject site, a “two-year event” causes runoff at the rate of .25 cubic feet per second (cfs), and that has produced erosion shown in the photographs contained in her Exhibit 70. Tr. 231-232. Ms. Mayo then introduced Exhibit 71, another rendered version of the SDP, to show the reduced forest in the same area and the increased area of just grass, after the proposed 31 unit development. According to Ms. Mayo’s calculations, the stormwater flow in a two-year event would increase threefold, to .85 cfs, due to increased imperviousness. The result would be significantly increased erosion on Turning Creek land. Tr. 233-235.

Ms. Mayo testified that decreasing the level of imperviousness on the subject site would reduce the water runoff and decrease damage to the environment. When asked where do you draw the line, Ms. Mayo suggested that the Maryland regulations set the limits on runoff, but that DPS had agreed to waive the regulations, in part, since the proposed townhouse development

could not fully meet them.¹¹ Tr. 237-238. In Ms. Mayo's opinion, "the acceptable number of units would be the maximum number of units they can get without having to waive storm water management requirements." Tr. 241.

Ms. Mayo further testified that, according to a publication of the United States Department of Agriculture, "*Technical Release 55*," under the heading "Urban Hydrology for Small Watersheds," the average percent of imperviousness in townhouse developments is 65%, while in single family detached developments of ¼ acre per unit, the average percent of imperviousness is a much lower 38%. Ms. Mayo introduced the relevant page of this publication as Exhibit 74. Tr. 245-246. The statistics in it are based on a nationwide average. Tr. 249. Ms. Mayo also introduced a graph (Exhibit 73) produced by the "Center for Watershed Protection," demonstrating that, even with best management practices (BMP), stream quality decreases dramatically as imperviousness increases. Tr. 243-247. Since the subject site is only about 500 feet away from the Cabin John Stream, a 31 unit development would be too damaging to that stream. Tr. 247.

Ms. Mayo indicated that she considered her letter to Mr. Brush of March 13, 2005 (attached to Exhibit 46) to be part of her testimony at the hearing. Tr. 249. On cross-examination, Ms. Mayo testified that, in her opinion, Applicant was incorrect in suggesting that after development of townhouses on the property, there would be less water runoff onto the Turning Creek property than before. Tr. 254.

2. Steve Dye:

Steve Dye, who lives just north of the subject site in the Inverness North Townhouse development, testified that traffic was very heavy on Seven Locks Road (Tr. 127-144) and that "[c]ars will back up through several light cycles to try to make it through this intersection [with Democracy Boulevard]," sometimes blocking the intersection. Mr. Dye also submitted a written statement

¹¹ It should be noted that this partial waiver was granted for the proposed 27 unit development. When DPS reviewed the 31 unit plan after the hearing, it fully waived the channel protection requirements. Exhibits 79 and 80.

about the traffic (Exhibit 58), which he adopted in his testimony (Tr. 127), and eleven recent photographs of the traffic backups (all contained in Exhibit 59 and explained in Exhibit 60).

Mr. Dye further testified that it was “not uncommon” for traffic to back up all the way to the subject site, partially because a police officer stops traffic to allow cars to turn into the Heights School in that area. Tr. 133. He felt that it was dangerous for cars trying to turn into the Heights School, and that pedestrians were also at risk because the sidewalk does not extend the full length of Seven Locks Road in the area. Mr. Dye summed up his testimony in one bolded line from page two of his statement (Exhibit 58): “Traffic on Seven Locks Road is currently an absolute mess.” He indicated that other developments planned for the area will throw additional traffic onto the road in the future, and there is little room for additional lanes on Seven Locks Road. The stretch of Seven Locks where the development might occur is narrow and doesn’t have sidewalks, yet there are bus stops there, and bus riders stand on the shoulder to wait for buses. Mr. Dye reports that “anecdotally,” he knows that accidents are quite common on this stretch of road.

3. Francis Cameron:

Mr. Francis Cameron testified that he lives in Turning Creek Development, which is south of the proposed development, and one his concerns is the erosion possibility. “We are at the bottom of the slope there and when I sit in my house during a rain storm and look across the street and up that hill, there's lots of water that pours out of there now and muddy water, it comes down through my across the street neighbor's side yard and his yard is pretty much denuded of grass, and I worry about the fact that the proposed development will exacerbate that particular problem. As Ms. Mayo talked about, at least for the one [area,] flow would be increased by three[fold] with the proposed development, so I am concerned about that . . .” Tr. 256.

C. Department of Permitting Services Witness

Richard Brush:

Richard R. Brush, Manager of the Water Resources Plan Review Section of the Department of Permitting Services (DPS) was called as a witness by both Applicant and the Opposition. The Section he heads reviews and approves stormwater management plans, sediment control plans, and flood plain district permit plans. Tr. 36-37. He testified as an expert in sediment control and stormwater management. Tr. 39.

Mr. Brush testified that the stormwater management concept plan (SWMCP) for the Burley property was reviewed in detail by Ellen Raider of his staff. The staff then reviewed the plan and, after getting Applicant to make some changes, Ms. Raider recommended approval. After Mr. Brush reviewed it, he also approved the Burley's SWMCP. Tr. 40.

Mr. Brush explained that there are several facets to storm water management. One is called the "control of the channel protection volume." That is a "quantity type of control." It is meant to provide protection to the stream channels when runoff finally gets to the actual streams. It controls the amount of runoff to prevent stream channel erosion. A second facet of storm water management is to treat the runoff to have it leave the site as clean as possible, by removing all pollutants. Treating the runoff is "quality control." Thirdly, there is a requirement for "recharge," to replenish ground water which maintains the base flow of streams, and that was included in this case, in addition to quantity and quality controls. Other facets of the plan included some nonstructural controls which really relate to runoff from down spouts or other impervious areas, draining across a certain length or percentage slope of grass to infiltrate that runoff and to slow it down. Tr. 41-42.

Mr. Brush further testified that DPS gave Applicant “a partial waiver of the channel protection volume.”¹² Tr. 43. Although the SWMCP that he had reviewed for this project had only 27 dwelling units, he felt that it was likely the concept would still be valid for 31 units. Tr. 44-45. [The Hearing Examiner decided that a new SWMCP, reflecting the actual number of dwelling units (31) planned for the development, should be submitted to DPS for review, since the plan already reviewed by DPS projected only 27 units.] Mr. Brush testified that he did not need an updated forest conservation plan in order to do a proper review of the updated storm water management concept plan. Tr. 54.

On cross-examination, Mr. Brush testified that the waiver of water or channel protection volume is the result of an engineering problem regarding the release rate of the water. In order not to release too much water, the release pipe used in the stormwater facility would have to be narrow, but if it is too narrow (less than 2 inches in diameter), it would tend to clog. Since the needed release rate would have called for a pipe less than the 2 inch minimum, DPS issued a partial waiver for that amount of storage that would be released by increasing the pipe diameter to two inches. The State actually uses a three inch diameter standard. The waiver wasn't granted because Applicant was seeking to avoid the requirements; it was just that “they couldn't physically do it because of the engineering, the size of the structure.” Tr. 56-57.

Mr. Brush further testified that even if Applicant had proposed an above ground storage facility instead of an underground storage facility, the waiver would likely be needed because of the concentration of runoff all into one area. Tr. 59. However, “if the site were reconfigured [with] . . . single family houses, a lot of that channel protection volume would be done through nonstructural type controls, [and] therefore, the standard would be met without a waiver being given.” Tr. 59. According to Mr. Brush, “In general, . . . the concentration of an impervious area

¹² After Applicant submitted its revised SWMCP (Exhibit 77(a-e)) following the hearing, DPS approved a total waiver of channel protection volume (*i.e.*, quantity control). Exhibits 79(a) and 80.

for single family houses is spread throughout a subdivision rather than being concentrated in one area. Therefore, the ability to use nonstructural controls is greater for single family houses.” Tr. 60. Steep slopes could require additional grading and create stormwater management problems, and a different layout might be required by Park and Planning if it were a single family development, so it is hard to say which development would create more runoff without seeing the precise site plans. Tr. 61-62. The level of imperviousness is “the real key” in determining whether waivers will be required. Tr. 67.

According to Mr. Brush, 62 percent of the site does not receive channel protection because the site drains several different ways, and therefore the runoff that goes in various directions is below the minimum standard of two cubic feet per second where channel protection is required. In other words, if the flow is less than two cubic feet per second (CFS), channel protection is not required anyway, and that is why, in some drainage areas, there is no requirement for a stormwater facility. Tr. 67.

The standard for recharge is not like the standards that are required for water quality control or for channel protection. Recharge is based on just an amount of water to be stored and dispersed into the groundwater. You can have one recharge area that's just for a portion of the site, but if you store enough water and allow enough of that water to disperse into the groundwater, that takes care of the requirement of the entire site. Tr. 68. Although 35 percent of the site may not be draining to a water quality treatment facility in the plan as submitted, the water quality treatment facility will still meet the appropriate standards. Tr. 69. Channel protection volume need not be controlled on the driveway access because the runoff on the driveway will be under two cubic feet per second. Tr. 72. The problems with steep slopes can be dealt with at the time of construction through sediment control plans. Tr. 73.

Mr. Brush testified as to the nature of DPS's review. Tr. 77.

We at the Department of Permitting Services don't look at site layout. We don't look at zoning. We don't look at anything like that. We basically look at what has been

given to us as has been allowed through the zoning process, and been allowed by others and try to make that work. That's really what we try to do. If it can't work completely, then a waiver has been granted. We don't deny concepts based on land use issues or land use decisions. If a land use decision has been made, let's say in this case, to go with townhouses, and a partial waiver is needed to make that work, that's what we'll grant. But we're not making a land use decision. We're not going to deny a concept and say, oh no, you can't do that, because that's not our role to do that. [Emphasis supplied]

In sum, DPS will require as much storm water protection as is possible on a given site, but will not turn it down for approval even if a waiver of stormwater control regulations is needed to proceed.

During the cross-examination of Mr. Brush, Mr. Francis Cameron, who lives just to the south of the proposed development, asked about the Site Plan review. Mr. Brush indicated that DPS would have the same approach at Site Plan as at the zoning stage. If a waiver is needed to meet the requirements, then DPS will give the waiver. "If there is no possible way of providing onsite management given the land use on a particular site, then a waiver would be granted." Typically only a partial waiver is granted, if granted at all, but full requirements are met on probably 90 percent of all development sites that come in for review and approval, and partial waivers are granted on others.

Mr. Brush noted that, when waivers are granted, there is a requirement that a fee in lieu be paid, and that fee in lieu goes into an account that's used by the Department of Environmental Protection for stream channel restoration. The fee goes to providing storm water management or stream protection, whether it be in that stream or another stream. At site plan, if the final plan doesn't meet the storm water management regulations, and full control is not feasible on the site, then the neighboring property owners can expect that there'll be a waiver granted and a fee paid by the developer into a fund at a later date. Tr. 78-80.

D. People's Counsel

Martin Klauber:

Martin Klauber, the People's Counsel, gave an opening statement (Tr. 19-23) in which he observed:

This is a problem property. Mr. Murray [Callum Murray, Technical Staff Team Leader on this case], in making his presentation to the Planning Board, said it was "close call". It is a close call because of the topography, because of the trees, because of the position next to a County park.

* * *

That storm water management concept [plan for the subject site], though a theory, is based on a theory, the layout. It has to work. The mechanics of that storm water management plan have to work or the theory of 31 townhouses has to be adjusted.

* * *

So the question is, . . . [a]t the zoning stage, can a storm water management plan be developed that is capable of making sure that the theoretical can be taken care of? And that's as best as we can do at the zoning stage.

* * *

Mr. Klauber also gave sworn testimony in the case. Tr. 26-35. He testified that every morning, five days a week, he uses Seven Locks Road to come to work, and he goes past the subject property. Stating that he is "personally aware what occurs on Seven Locks Road fronting the subject property during the peak traffic hours," Mr. Klauber reached the conclusion that "the access shown on the schematic development plan from Seven Locks Road is absolutely unsafe."

He so concluded because the Heights School entrance, directly opposite the proposed entrance to the subject site, results in a traffic queue as parents driving northbound in an effort to drop their children off in the morning, stop to make a left turn into the Heights School, across the southbound traffic. In Mr. Klauber's opinion the proposed entrance for the subject site should not be placed directly opposite the Heights School entrance.

When asked on cross-examination whether the traffic backed up on Seven Locks Road, he testified:

[T]here are access points up and down Seven Locks Road from developments on both sides of Seven Locks Road, and there's back ups. There's back ups in the morning, and there's back ups in the evening, and I guess that's a fact of life here in Montgomery County.

When asked specifically about back-ups on Seven Locks Road from the intersection with Democracy Boulevard, Mr. Klauber testified, “Yeah, it backs up. I've been in the back ups. . . . Traffic is probably, so far as I can figure out, not at a standstill. How well the light at, what the level of service is at Seven Locks and Democracy is something that I assume we're going to hear about. . . . I've seen, you know, bumper to bumper traffic on Seven Locks Road . . .”

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the

regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110*.

Montgomery County has many floating zones, including the R-T Zones. The R-T 8 Zone contains development standards and a post-zoning review process that generally delegate to the Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a re-zoning.

When the reclassification sought by an applicant is recommended by the applicable Master Plan, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Master Plan does not recommend the reclassification sought, the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval, unless the Planning Board has recommended approval. Zoning Ordinance §59-H-8.2(b). As mentioned earlier, the *Potomac Subregion Master Plan*, approved and adopted in April 2002, does not recommend the R-T Zone for the subject site, but the Planning Board did recommend approval, and therefore a simple majority of 5 members of the Council is required for approval pursuant to Zoning Ordinance §59-H-8.2(b).

As discussed in Part III.F. of this report, compliance with Master Plan recommendations is not mandatory in this case because the R-T Zone does not require it; rather, the courts have held that the Master Plan should be treated only as a guide in rezoning cases like this one. See *Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997).

In order to determine whether or not that guidance should be followed in this case, we return now to the three areas of Council review discussed above, the purpose and requirements of the zone, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause

The intent and purpose of the R-T Zone as stated in Code §59-C-1.721 is set forth below.

The purpose of the R-T Zone is to provide suitable sites for townhouses:

- (a) *In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*
- (b) *In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.

As is evident from the statutory language, the R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses. The relevant Master Plan did not specifically designate the subject site for the R-T Zone, nor is the subject site in a location where there is a need to buffer between commercial, industrial or high-density apartments and single-family homes. Thus, the Purpose Clause cannot be satisfied under those two criteria.

However, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones.*” In other words, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy

only one of them. Thus, we must now determine whether the evidence establishes that the subject site “is appropriate for residential development at densities allowed in the R-T Zones.”

Evidence supporting Applicant’s contention that the subject site satisfies the “appropriate” criterion includes the following facts: Both the Technical Staff and the Planning Board recommended approval of the rezoning, subject to strict review of environmental concerns at site plan and subdivision. Compatibility with surrounding development (in terms of the type of housing units proposed) is not a real issue since the subject site is surrounded on its north, its south and, to some extent, its west with townhouse developments at comparable densities. In the opinion of Applicant’s land use expert, the proposed townhouses are also compatible with the abutting parkland, since the townhouse communities to the north and south also abut the parkland. Tr. 169. As part of Applicant’s forest conservation plan, she will be reforesting about .75 acre of land. Tr. 170-171. Applicant has limited the development to a building coverage which is 15 percent lower than the maximum, and a green area 15 percent above the minimum required by the Zone. Tr. 110-111.

The proposals would also provide plenty of open space and other amenities for the residents and will offer the townhouses in fee simple, consistent with the stated intent of the R-T Zone. Tr. 147-148. The site would also provide more parking than required. Although the Master Plan does not recommend the R-T Zone, it does recommend continuation of the residential use, which is consistent with this proposal. Under LATR standards, the proposed development would not generate enough peak hour trips to warrant a traffic study, and thus by that measure it would not create traffic problems for the neighbors.¹³

Perhaps the strongest argument in favor of a finding of appropriateness is the fact that the Council had previously approved this site for development under the R-T Zone, and at even greater

¹³ As mentioned in Part III.H.1 of this report, the Hearing Examiner is required by the case law to consider evidence of traffic problems beyond the LATR, and there was a great deal of such evidence in this case.

density than that which is sought here. This action took place in 1969, when the Council considered and approved zoning application F-419 and rezoned the subject property from the R-90 zone to the R-T Zone. However, the value of that action as precedent is severely undermined by the significant changes in the applicable stormwater management and forest conservation regulations since 1969, and by changes in the state of development in the area. In any event, when the planned project failed to go forward after the 1969 rezoning, the Burley family was left with a property which it could no longer afford to own because of the increased tax assessment associated with the more intense zoning. In an effort to relieve the tax burden on the property owner, the County Council, in 1973, rezoned the property back to the previous R-90 zoning classification. Exhibit 52.

In spite of these factors, the Hearing Examiner has concluded that the subject site, with the presently planned development, would not be “*appropriate for residential development at densities allowed in the R-T Zones,*” at least not at the density sought by this Applicant. This conclusion is based on evidence received during and after the hearing, and is discussed at length in Parts III. I. and III.H.1 of this report. Neither the Planning Board nor the Technical Staff had the benefit, before they made their recommendations, of hearing the testimony of Ms. Mayo and Messrs. Brush and Cameron regarding the causes and effects of excess stormwater runoff, imperviousness and erosion. Nor did they hear the testimony of Messrs. Klauber and Dye regarding traffic volume and safety issues. Moreover, they could not have predicted that DPS would find it necessary to entirely waive all stormwater quantity controls, as was done after the hearing.

That testimony and the related exhibits have convinced the Hearing Examiner that the best path for all concerned in this case is not to approve the present configuration, but not to outright reject rezoning to the R-T 8 Zone. Instead, the rezoning application should be remanded to permit Applicant, in conjunction with DPS, to design a development configured in a way that will allow complete channel protection (*i.e.*, full quantity controls) and to permit Applicant to make a

commitment to mitigating the potential traffic problem in the manner determined by the Planning Board.

Bearing in mind that the choice is not between development and no development, the Hearing Examiner does not base this conclusion on the fact that development will mean the loss of forested area. Rather, it is the impact from uncontrolled stormwater runoff and the possibility of a dangerous traffic situation that concern the Hearing Examiner. Absent a remand, this situation, described at length in Part III. I. of this report, may not be remedied because DPS does not view its role as prohibiting development based on noncompliance with stormwater management regulations, once the land use has been approved by the Council and the Planning Board. DPS just insists on the best controls reasonably possible for the land-use configuration presented, and if those controls are insufficient to meet the regulations, DPS will waive the requirements regardless of the resulting stormwater runoff. That is what has been done here, and the evidence establishes that DPS will not change this approach at site plan.

If a new land use configuration is presented to DPS in a revised SWMCP, they will review it with an eye towards meeting the regulations. Moreover, in order to ensure that the traffic congestion problems and safety concerns detailed in Part III. H.1 of this report are rectified, a level of commitment from Applicant, higher than an acknowledgement, should be evidenced.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned uses in the surrounding area. Technical Staff observed that “[t]he proposed development will be compatible in terms of density with the surrounding and abutting townhouse developments. A conservation easement is proposed on the northern boundary to screen the Inverness North development from the proposed units and all setbacks exceed the minimum requirements.” Exhibit 46 at page 8. If it were not for the potential stormwater runoff problem

and the traffic hazards discussed above, it would be hard to argue with this observation, since the subject site is practically surrounded with townhouse developments on three sides, the only exception being a school directly across Seven Locks Road and Cabin John Regional Park to the East of the subject site. There is no evidence that a townhouse development would be incompatible with either the nearby school or the abutting parkland, and indeed there was no evidence suggesting that a townhouse development at the proposed density would be incompatible with any surrounding development, except for the environmental and traffic issues already mentioned. In fact, the Council not only approved reclassification of the abutting properties on the north and south of the subject site to R-T Zone, it actually approved the subject site for such zoning, only to have it subsequently zoned back to its Euclidian R-90 Zone at the landowner's request to lower taxes.

In sum, if it were not for the environmental and traffic concerns, compatibility would not really be an issue here. The Hearing Examiner believes that a townhouse development on the subject site would be compatible, if the density and physical arrangement of the site were revised to eliminate the stormwater runoff and traffic problems which would impact adversely on the neighbors under the present plan.

C. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”
[Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. The Master Plan and the recommendations of the Planning Board and Technical Staff were considered in Parts V. and V.A. of this report. The Master Plan does not expressly recommend the zoning change sought by Applicant, but it does support the residential land use proposed here. The Planning Board and its Technical Staff supported the proposed rezoning, intending that corrections to protect the environment would be made at subdivision and site plan review. When they reached these conclusions, neither the Planning Board nor the Technical Staff had the benefit of evidence introduced during and after the hearing, as outlined in this report.

The impact on public facilities was discussed in Part. III. H. of this report. The evidence indicates that the 31 dwelling units proposed here are expected to generate eight elementary school students, four middle school students and five high school students. The Annual Growth Policy (AGP), schools test has determined that the Churchill Cluster has adequate capacity. Tr. 175. This assertion is supported by the June 10, 2003 letter of Joseph J. Lavorgna, the Director of Planning and Capital Programming for the Montgomery County Public Schools, as amended by the March 23, 2005 telephonic update from Bruce Crispell, Demographic Planner, Montgomery County Schools (Exhibit 75(a)). At the same time, Mr. Lavorgna's letter indicates that all three schools are over capacity, as measured by MCPS, with the high school and elementary school projected to remain over capacity for the six-year forecast period, while the middle school was projected to remain near capacity. The hearing examiner concludes that the relevant schools are crowded, but not over capacity using the Council's yardstick.

The traffic situation is much more complicated, because the expected traffic from the development is not high enough to require a traffic study to satisfy LATR, but the testimony at the

hearing established that there are backups at the nearby intersection of Seven Locks Road and Democracy Boulevard, and there may be a dangerous situation if the access road is located where presently planned. This situation was discussed at length in Part III. H. 1. of this report.

In this case, Applicant faces a kind of “quadruple whammy” – its proposed rezoning is not recommended by the Master Plan, it will adversely impact the environment, it will add, if minimally, to traffic overcrowding on Seven Locks Road, and it will add to the burden of crowded schools. The overall impact of these negative characteristics leads the Hearing Examiner to conclude that the development, as currently planned, would be inappropriate, incompatible and against the public interest.

The school crowding is not a major factor in this conclusion because the AGP standards find the school cluster to be within capacity. Likewise, the fact that the Master Plan calls for a different residential zone (R-90 v. R-T 8) is not be dispositive because the general land use would be the same as the Plan calls for (*i.e.*, residential) and the Council specifically decided not to include the subject site as future parkland in the Master Plan. However, the environmental and traffic concerns, especially stormwater management, are dispositive because, under the present circumstances, they render the subject site inappropriate for development at this density and make the proposed development incompatible with its surroundings and counter to the public interest.

The Hearing Examiner recommends remand because it is possible that a remand can lead to a modified proposal which will pass environmental muster and which will give greater assurance that traffic problems can be alleviated.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The application has not satisfied the requirements of the purpose clause because it has not demonstrated that the development, as currently planned, will be “appropriate” for the environment and the area traffic situation;
2. The application proposes a form of development that would be compatible with existing and planned land uses in the surrounding area, if the density and physical arrangement of the site were revised to eliminate the stormwater-runoff and traffic problems which would impact adversely on the neighbors under the present plan.; and
3. On the current state of the evidence, the requested reclassification to the R-T 8 Zone has not been shown to be in the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-809, requesting reclassification from the R-90 Zone to the R-T 8 Zone of 5.23621 acres of land, known as Parcels 361 and 417, with addresses of 10401 and 10525 Seven Locks Road, and located on the east side of Seven Locks Road, approximately 1,600 feet north of its intersection with Democracy Boulevard, in the 10th Election District, in Potomac, be **remanded** with instructions that require a sufficient reduction in the number of planned dwelling units such that the Department of Permitting Services can approve a Stormwater Management Concept Plan without waiving channel protection requirements, and requiring Applicant to commit, in Binding Elements, to any necessary traffic mitigation measures. In addition, as suggested by the Hearing Examiner, the Applicant is invited, on remand, to present additional expert evidence on mitigating traffic problems on Seven Locks

Road, near the subject site. The final submitted SDP and covenants should contain the following notation in their Binding Elements:

Further, Applicant agrees to undertake right of way dedication and any traffic mitigation measures required by the Planning Board at subdivision and Site Plan.

Dated: July 12, 2005

Respectfully submitted,

Martin L. Grossman
Hearing Examiner